CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1929

J. FRANK McCALL v. GLOUCESTER LUMBER COMPANY AND JOSEPH S. SILVERSTEEN.

(Filed 13 February, 1929.)

1. **Appeal and Error—Record—Questions Presented for Review.**

   In the Supreme Court the appellant is confined to the theory upon which he tried his case in the court below.

2. **Damages—Measure of Damages—Breach of Contract.**

   Where the seller contracts to deliver lumber for an indefinite time at a certain price at the place of delivery, upon the purchaser's breach of his contract to receive and pay for it, the seller may recover the difference between the contract price and the fair market value of the lumber at the place of delivery, taking the fair market value at the time of the breach and not at the date the future deliveries would have been made, and an instruction that he could recover the difference between the market price and the value of the lumber undelivered, without deducting the cost of delivery, is erroneous.

3. **Trial—Instructions—Requests—Appeal and Error.**

   An erroneous instruction on the issue of the measure of damages entitled the party prejudiced thereby to a new trial without the necessity of his having submitted a prayer for instructions thereon.

APPEAL by defendant, Gloucester Lumber Company, from *MacRae, Special Judge,* and a jury, at March Term, 1928, of TRANSYLVANIA. New trial.

The plaintiff instituted this action to recover damages for the breach of an alleged contract made and entered into by him with the Gloucester Lumber Company, a corporation, and Joseph S. Silversteen, on 1 August, 1916. There was a judgment of nonsuit in the court below as to the defendant Silversteen. The alleged contract contains certain recitals: Whereas (1) said Gloucester Lumber Company is desirous of obtaining the right to construct and operate a line of its railroad over and about one-fourth mile of the said J. Frank McCall's land in Gloucester Township, known as the J. G. McCall Place. (2) The said J. Frank McCall is desirous of selling to the said Gloucester Lumber Company certain saw timber, acid wood and tan bark growing *on his land* on and near the railroad of said Gloucester Lumber Company. (3) The said parties "for and in consideration of the sum of one dollar each to the other in hand paid, the receipt of which is hereby acknowledged, and upon the stipulations, agreements and conditions hereinafter set out, have entered into this contract upon the following conditions, which is to say:

Section 1. The said J. Frank McCall agrees that the Gloucester Lumber Company shall have the right to build its line of logging railroad over about one-fourth mile of his land in Gloucester Township on the waters of North Fork, known as the J. G. McCall Place, upon the following conditions being complied with by the Gloucester Lumber Company.

Section 2. The Gloucester Lumber Company agrees and binds itself and its assigns *to purchase from the said J. Frank McCall all of the merchantable saw timber which he may deliver—by the railroad and the said Gloucester Lumber Company* at ...., to be agreed upon between the parties hereto—and to pay for the same within thirty days after the same is scaled, with no right or privilege on the part of the Gloucester Lumber Company to retain any part of the purchase price as "hold back."

If there is any dissatisfaction with the scaling by the company, then J. Frank McCall to have a representative present to assist in the scaling. Other provisions:

(A) (1) "The Gloucester Lumber Company further agrees *to purchase all the acid wood which the said J. Frank McCall may deliver on cars of the Gloucester Lumber Company* at a price of $4 per cord of 168 cubic feet (said cars to be placed on the track of the Gloucester Lumber Company at such place or places as the said J. Frank McCall may designate). (2) And if the market price of the said wood advances, then the said J. Frank McCall shall receive the benefit of such advance, and in no case shall the said J. Frank McCall receive less than $3.75 per cord for said acid wood, and in no case shall the Gloucester Lumber Company receive more than $1 per cord as freight charges.

(B) "It is further agreed that the Gloucester Lumber Company shall pay to the said J. Frank McCall $8 per ton of 2,240 pounds (1) *for all tan bark delivered on cars of the Gloucester Lumber Company* (such cars to be placed at such points along the said company's railroad as the said J. Frank McCall may designate, (2) and if the market price of said tan bark advances then the said J. Frank McCall shall receive the benefit of such advance; and the Gloucester Lumber Company shall pay for the said tan bark once each month, and shall have no right or authority to withhold any part of the purchase price of said tan bark; it is further understood and agreed that the Gloucester Lumber Company shall scale, measure and take up the saw logs, and acid wood and tan bark at least once each month, and pay for the same monthly with no right or authority to 'hold back' any money due thereon as the purchase price of the same; *and the Gloucester Lumber Company stipulates and agrees to take all the aforesaid wood products at the prices therein named which the said J. Frank McCall shall deliver as hereinbefore set out and specified.*

(3) This contract signed in duplicate and consisting of two sheets, and each party furnished with his copy, which copy for the purposes of this contract are held and considered by the parties hereto as the original. This contract shall continue to be in force until abrogated or modified by written agreement between the parties signatory thereto. This the 1st day of August, 1916.

(Signed) GLOUCESTER LUMBER COMPANY.
By ...., President.
.... (Seal)."

The defendant, Gloucester Lumber Company, denied making the contract and sets up the defense of (1) *res judicata*, (2) contractors' agreement between J. Frank McCall and Gloucester Lumber Company, dated 6 April, 1915, whereby J. Frank McCall agrees to cut and deliver on board cars certain lumber on a certain boundary of timber "known as Bruce Knob Branch." The Gloucester Lumber Company alleges a breach by J. Frank McCall and sets up a counterclaim for damages.

The plaintiff alleges that under the contract of 1 August, 1916, it delivered "logs, cord wood, tan bark and other merchantable timber and products at points along the railway of the said Gloucester Lumber Company, and the defendants received, accepted and in the main paid for said logs, cord wood, tan bark and other merchantable timber so delivered until about the latter part of the year 1923, when the defendants and each of them breached their said contract with the plaintiff, and then and thereafter wrongfully and wilfully refused to receive, accept, ship, transport or pay for any of said logs, cord wood, tan bark and merchantable timber or other products of the plaintiff, and then and since said time have refused to carry out said contract to the great damage of the plaintiff. . . . When the said defendants refused to carry out said contract with the plaintiff it rendered the plaintiff's merchantable timber, as above referred to, valueless and worthless because of the remoteness of said timber from a shipping point; and that the defendants, since said breach of contract, and recently, have torn up their said railway, discontinuing same and removing the rails therefrom, leaving this plaintiff's timber unmarketed and of practically no value whatever."

It was in evidence, on the part of the plaintiff, that the railroad was built in 1916 across the land.

"Q. Had you completed taking out your property as mentioned in this contract, cross-ties, bark, acid wood and saw timber at the time they took up the railroad, moved it away from there? A. No, sir, had put in half of it. The railroad was taken away before my timber was removed, without my consent. This suit was brought before it was taken away. I didn't consent to it. I couldn't help myself. Quite a bit of it was already there and they refused to take it.

"Q. Did they, prior to taking the railroad away, signify whether they would or would not haul your material? A. They had forbidden me putting it on the railroad. About two years before they moved the railroad they refused to receive my products there, 1923 and 1925, my recollection."

The half undelivered, as alleged by plaintiff, was mostly stumpage or standing timber uncut, about 300,000 feet of saw timber, acid wood and tan bark.

The court below ruled out the evidence in regard to cross-ties as not included in the contract. The issues submitted to the jury and their answers thereto, were as follows:

"1. Is the defendant indebted to the plaintiff, as alleged in the complaint, and if so, in what amount? Answer: Yes, $9,500.

"2. Is the plaintiff indebted to the defendant, as alleged in the defendant's counterclaim, and if so, in what amount? Answer: No—none."

Ralph Fisher, T. B. Galloway and Bourne, Parker & Jones for plaintiff.

T. Colender Galloway, W. E. Breese and Merrimon, Adams & Adams for defendant, Gloucester Lumber Company.

Clarkson, J. The record discloses many interesting questions that we need not now consider.

"A party is not permitted to try his case in the Superior Court on one theory and then ask the Supreme Court to hear it on another and different theory. *Warren v. Susman,* 168 N. C., 457." *Shipp v. Stage Lines,* 192 N. C., at p. 478; *In re Will of Efird,* 195 N. C., at p. 84.

The theory upon which the court below tried the case: The evidence of plaintiff tended to establish the contract as alleged by him. The probative force of the evidence was for the jury and they found the contract was as contended for by the plaintiff. We come to consider the contract: (a) "The Gloucester Lumber Company agrees and binds itself and its assigns to purchase from the said J. Frank McCall all of the merchantable saw timber which he may deliver—by the railroad of the said Gloucester Lumber Company at—to be agreed upon between the parties hereto—and to pay for the same within thirty days after the same is scaled, with no right or privilege on the part of the Gloucester Lumber Company to retain any part of the purchase price as 'hold back.' (b) The Gloucester Lumber Company further agrees to purchase all the acid wood which the said J. Frank McCall may deliver on cars of the Gloucester Lumber Company at a price of $4 per cord of 168 cubic feet (said cars to be placed on the track of the Gloucester Lumber Company at such place or places as the said J. Frank McCall may designate. And if the market price of the said wood advances, then the said J. Frank McCall shall receive the benefit of such advance, and in no case shall the said J. Frank McCall receive less than $3.75 per cord for said acid wood, and in no case shall the Gloucester Lumber Company receive more than $1 per cord as freight charges. (c) It is further agreed that the Gloucester Lumber Company shall pay to the said J. Frank McCall $8 per ton of 2,240 pounds for all tan bark delivered on cars of the Gloucester Lumber Company (such cars to be placed at such points along the said company's railroad as the said J. Frank McCall may designate), and if the market price of the said tan bark advances, then the said J. Frank McCall shall receive the benefit of such advance," etc.

From a just construction of the contract, all the wood product had to be hauled and delivered at the railroad. The reasonable cost to cut, haul and deliver this from the stumpage was a material item. The court below charged the jury, to which exception and assignment of error was made, as follows: "The court charges you that if you find by the greater weight of the evidence that the plaintiff and defendant entered into the contract as alleged in the complaint, and if you find that J. F. McCall was the owner of the wood products on the J. G. McCall tract, in Dave's Cove and on Indian Creek, or had the right to contract for the sale and delivery of the same, and that he granted a right of way over the same; that in compliance with the terms of said contract he did grant a right of way over the said land; that in consideration for the granting of said right of way the defendant agreed to purchase from the plaintiff the saw timber, acid wood and tan bark on said land, and that the defendant breached the contract by refusing to accept and pay for said wood products, *then the plaintiff would be entitled to recover of the defendant the difference in the value of said wood products before and after said breach.* If you find that the plaintiff and defendant did not enter into the contract, as alleged, or that the plaintiff did not grant to the defendant the right of way, as alleged, then you should find that the plaintiff is entitled to recover nothing." In the charge we think there was error.

In *Construction Co. v. Wright,* 189 N. C., at p. 460, this Court, speaking to the subject, said: "The plaintiff challenged the right of the defendant to present this question in an exception to the charge, because the defendant did not ask, in writing, for any special instructions on this question. It appears to us not to be necessary, in the instant case, in order to present this question, that a written request should have been made. The true rule appears in *Strunks v. Payne,* 184 N. C., 582. Whenever the trial court attempts to state the rule of law applicable to the case, he should state it fully and not omit any essential part of it. The omission of any material part is, necessarily, error of an affirmative or positive kind. Therefore, it may be taken advantage of on appeal, by an exception to the charge, without a special request for the omitted instruction."

In *Bank v. Rochamora,* 193 N. C., at p. 8, quoting numerous authorities, the law is thus stated: "Where the instruction is proper so far as it goes, a party desiring a more specific instruction must request it." This applies to subordinate elaboration, but not substantive, material and essential features of the charge. C. S., 564.

The vice in the present case is that the instruction is not proper so far as it goes. The learned and careful judge trying a long and complicated case as the present, inadvertently laid down an erroneous rule to guide the jury as to the measure of damages under the contract in this case.

In *Hunter v. Gerson,* 178 N. C., at p. 486, bearing on the subject, it is said: "The rule for assessment of damages in a case like this is well settled, and it is the difference between the contract price of the rails and their fair market value at the time and place fixed by the contract for their delivery. *Lumber Co. v. Furniture Co.,* 167 N. C., 565; *Lumber Co. v. Mfg. Co.,* 162 N. C., 395; *Berbarry v. Tombacher,* 162 N. C., 497. In the first case cited above the Court says: 'The court gave correct instructions as to the rule for admeasuring damages, it being the difference between the contract price and the market price at the place and time appointed by the contract for the delivery. This is the standard of adjustment, as between the parties where there has been a breach, or failure to deliver, from a very ancient period, and is, we believe, universally adopted as being in reality the only one for our safe guidance, and a very just one, too.' "

We extract (quoting from *Masterton v. The Mayor,* etc., 7 Hill, at p. 71) the following from *Hawk v. Lumber Co.,* 149 N. C., at p. 14: "The language of *Nelson, C. J.* (afterwards a Justice of the Supreme Court of the United States), is especially applicable to our case. He says: 'Where the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on that day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance. The basis upon which to estimate the damages, therefore, is just as fixed and easily ascertained in cases like the present, as in actions predicated upon a failure to perform at the day.' "

The contract fixed no time for performance or price as to the merchantable saw timber and the price of the acid wood and tan bark was subject, under the contract, to *fluctuation.* The standard of adjustment is the fair market value at the time of the breach. The railroad was fixed in the contract as the place of delivery. The measure of damages is the difference between the fair market value for the wood product delivered according to the terms of the contract and the fair market value of the property in its then condition at the time of the breach.

Briefly, market value or price means the fair value as between one who desires, but is not compelled to buy and one who is willing but not compelled to sell.

This error was material and prejudicial under the facts and circumstances of this case. For the reasons given there must be a

New trial.

E. A. HELSABECK v. H. F. VASS, J. B. McCREARY, SHERIFF, ET AL.

(Filed 13 February, 1929.)

1. Judgments—Entry, Record, and Docketing—Liens.

A judgment of the Superior Court is a lien upon the lands of the judgment debtor that he may own in the county at the time the judgment was docketed, but not upon lands which had been previously conveyed bona fide either by registered deed or mortgage upon which foreclosure has been made, or under execution sale of a prior docketed judgment of the Superior Court. C. S., 614.

2. **Corporations—Corporate Powers and Liabilities—Liability to Employees for Services Rendered—Liens.**

The provisions of C. S., 1140, that mortgages of a corporation will not exempt the mortgaged property from execution for the satisfaction of any judgment obtained in the courts of the State against such corporation for labor and clerical services performed, etc., creates a priority in favor of those performing labor or rendering clerical services only from the time a judgment has been entered by a court of competent jurisdiction ascertaining the amount and declaring the priority, and when so established it relates back and becomes prior to that of general creditors of the corporation under a prior registered judgment.

3. **Same—Officers.**

C. S., 1140, is for the protection of employers of a corporation and not to its officers, the latter being deemed to be in position to know its financial condition when continuing to perform their duties.

4. **Same—Evidence—Questions for Jury.**

Where corporate property has been mortgaged and the mortgage foreclosed, and an execution is sought on this property by those claiming a priority under the provisions of C. S., 1140, for services and clerical work performed as employees of the corporation, and in a suit to restrain this execution it is denied that they were employees within the intent of the statute, but performed their duties as officers thereof: *Held,* reversible error for the trial judge to hold that they would be entitled to execution if they were officers of the corporation.

5. **Mortgages—Foreclosure by Action—Sale—Rights of Purchaser Thereunder—Notice—Corporations—Execution.**

A notice at a foreclosure sale of the property of a corporation under a mortgage that the employees of the corporation claim a priority under the provisions of C. S., 1140, does not affect the title conveyed to the purchaser at the sale, but the claimants after obtaining judgment against the corporation may maintain the superiority of their claims to those of the purchaser, but the purchaser is entitled to be heard, and may bring suit to restrain the execution.

APPEAL by plaintiff from *MacRae, Special Judge,* at May Term, 1928, of FORSYTH. New trial.

Action to enjoin sale of land and other property under an execution issued at the request of defendant, H. F. Vass, to the sheriff of Forsyth County. At the date of the commencement of this action, the said sheriff had advertised the said land and other property for sale under said execution.

The execution was issued for the satisfaction of a judgment in favor of defendant, H. F. Vass, and against the Alderman Manufacturing Company, a corporation, for the sum of $2,589.91, with interest thereon from 31 October, 1927. Said judgment was rendered on 5 December, 1927, in an action begun in the County Court of Forsyth County on 1 November, 1927, in which defendant, H. F. Vass, was the plaintiff and the Alderman Manufacturing Company was the defendant. Since the commencement of said action, and prior to the rendition of the judgment therein, plaintiff has become the owner of the land and other property which the sheriff has advertised for sale under the execution issued to him on said judgment. At the date of the docketing of said judgment, the Alderman Manufacturing Company, the judgment debtor, was not the owner of said land and other property, or of any interest therein.

On 15 April, 1926, the Alderman Manufacturing Company, on that date the owner thereof, conveyed the said land and property to a trustee to secure the payment of certain bonds recited in the deed of trust. Default having been made in the payment of said bonds, the said trustee, after fully complying with the terms of the power of sale contained in said deed of trust, offered the said land and other property for sale on 31 October, 1927. At said sale, the plaintiff in this action was the purchaser of said property; the sale was duly confirmed and on 12 November, 1927, the trustee conveyed the said property to the plaintiff, who had fully complied with his bid, by deed which was duly recorded. Plaintiff at once entered into possession of said land and other property, and at the date of the commencement of this action was the owner of the same.

On or about 1 February, 1927, defendant, H. F. Vass, entered into a contract with the Alderman Manufacturing Company, under which he performed certain services for said company, which he alleges were clerical in their nature. At the sale on 31 October, 1927, the said defendant caused notice to be given to all persons present, that he had a claim against the Alderman Manufacturing Company for the sum of $2,589.91, the same being the amount due for salary and wages for clerical services, and that he claimed a lien on the property of the said Alderman Manufacturing Company, for said sum, superior to any mortgages or deeds of trust, executed by said company on said land and property. On the next day after the sale, to wit, on 1 November, 1927, the said H. F. Vass instituted an action in the County Court of Forsyth County against the Alderman Manufacturing Company on said claim. This action pended in said county court until 5 December, 1927, on which day judgment was rendered in favor of said H. F. Vass and against said Alderman Manufacturing Company for the sum of $2,589.91, with interest thereon from 31 October, 1927. This judgment was rendered by default, defendant in said action having failed to file an answer to the verified complaint therein.

Execution having been issued on said judgment, at the request of defendant, H. F. Vass, the sheriff of Forsyth County has advertised said land and property, formerly owned by the Alderman Manufacturing

Company, and now owned by plaintiff, for sale to satisfy said judgment. This action was thereupon begun to enjoin said sale.

At the trial the only issue submitted to the jury by the court, was answered as follows:

"Did the defendant, H. F. Vass, give notice of his claim against Alderman Manufacturing Company, as alleged in the answer? Answer: Yes."

From judgment dissolving the temporary restraining order entered herein, and dismissing the action, plaintiff appealed to the Supreme Court.

W. L. Wilson and Chas. R. Helsabeck for plaintiff.
J. E. Alexander and L. M. Butler for defendant.

CONNOR, J. At the date of the docketing of the judgment on which execution has been issued to the sheriff of Forsyth County, to wit: 5 December, 1927, the judgment debtor was not the owner of the land and other property which has been advertised for sale by the said sheriff, under said execution. The judgment debtor, a corporation, had theretofore conveyed its legal title to said property by a deed of trust to secure creditors, which had been duly recorded prior to the rendition of said judgment; its equitable title had been foreclosed, and the said land and other property had been conveyed by the trustee to the plaintiff, by deed recorded on 12 November, 1927. The judgment is, therefore, not a lien on the said land by virtue of C. S., 614.

A docketed judgment for the recovery of a sum of money is a lien on land, situate in the county in which the judgment was docketed, and owned by the judgment debtor at the date on which the judgment was docketed, or on such land as has been acquired by the judgment debtor at any time within ten years from the date of the rendition of the judgment. It is not a lien on land which has been conveyed by the judgment debtor by deed duly registered prior to the docketing of the judgment; nor is it a lien on land conveyed by the judgment debtor by mortgage or deed of trust, prior to the docketing of said judgment, where the mortgage or deed of trust has been foreclosed, under a power of sale contained therein, and the land conveyed to the purchaser at the foreclosure sale prior to the docketing of the judgment. In the instant case, the judgment on which the execution was issued was not a lien on the land which the sheriff has advertised for sale, by virtue of C. S., 614. Neither the said land nor the other property, now owned by the plaintiff, and acquired by him by deed duly recorded prior to the docketing of the judgment is subject to sale by the sheriff under execution on said judgment, unless the same is subject to such sale, by reason of the provisions of C. S., 1140, which is as follows:

"Mortgages of corporations upon their property or earnings cannot exempt said property or earnings from execution for the satisfaction of any judgment obtained in courts of the State against such corporation for labor and clerical services performed, or *torts* committed whereby any person is killed, or any person or property injured."

A claim against a corporation, not reduced to judgment, whether for labor and clerical services performed in behalf of, or for damages arising from a *tort committed* by the corporation, is not a lien on its property by virtue of the foregoing statute. It was so held by this Court in *Clement v. King,* 152 N. C., 456, 67 S. E., 1023. In the opinion for the Court in that case, *Manning, J.,* cites with approval *Coal Co. v. Electric Light Co.,* 118 N. C., 232, 24 S. E., 22, where it is said that the statute creates no lien, but undertakes to afford the creditor protection by disabling a corporation from conveying its property by mortgage freed from liability upon a judgment obtained against such corporation on a claim included within the provisions of the statute. This protection is afforded only when judgment has been obtained on the claim in a court of this State. When this has been done, the property of the corporation, although theretofore conveyed by the corporation by mortgage or deed of trust to secure creditors, is not exempt from sale under execution on the judgment. The effect of the statute is to make a mortgage or deed of trust to secure creditors, executed by a corporation, void as to judgments recovered upon claims for labor and clerical services performed in behalf of, or for damages, arising from a *tort* committed by the corporation. As to such judgment creditors, the mortgage or deed of trust is nonexistent. It has therefore been held by this Court that where the judgment was obtained after the foreclosure of the mortgage or deed of trust, and after the registration of the deed by which the mortgagee or trustee conveyed the property of the corporation to the purchaser, such property is subject to sale under execution issued on the judgment. *Williams v. R. R.,* 126 N. C., 918, 36 S. E., 189; *R. R. v. Burnett,* 123 N. C., 210, 81 S. E., 602; *Belvin v. Paper Co.,* 123 N. C., 183, 31 S. E., 655.

The first question presented for decision by this appeal is whether the judgment in favor of H. F. Vass and against the Alderman Manufacturing Company, recovered in the County Court of Forsyth County, after the execution and registration of the deed, under which plaintiff claims, was conclusive upon the plaintiff in this action, as to the amount of defendant's claim against said corporation, and also as to the cause of action upon which the judgment was rendered. The trial court ruled that the judgment was conclusive not only upon the Alderman Manufacturing Company, but also upon the plaintiff, who was not a party to the action in which the judgment was rendered. In this there was error. The principle that a judgment is conclusive both as to parties and as to their privies has no application upon the facts of this case. The judgment of the county court did not affect or purport to affect, the property advertised for sale by the sheriff, which was formerly owned by the Alderman Manufacturing Company, and which is now owned by the plaintiff. It was a judgment for the recovery of money. There was neither allegation in the complaint nor adjudication in the judgment that said judgment was or should be a lien on specific property, or that any specific property should be subject to execution for the satisfaction of said judgment. Although by virtue of C. S., 1140, the property of the Alderman Manufacturing Company did not become exempt from execution on the judgment, if for labor and clerical services, by reason of the conveyance of said property by the trustee to the plaintiff, as the purchaser at the foreclosure sale, the judgment may be attacked by plaintiff, in this action, both as to the amount which defendant H. F. Vass is entitled to recover under his contract with the Alderman Manufacturing Company, and as to the cause of action upon which said judgment was recovered. Plaintiff is entitled to be heard before his property can be sold for the satisfaction of the judgment, even if under C. S., 1140, it is subject to such sale, upon his allegation that the services performed by defendant, H. F. Vass, were not for clerical services, within the meaning of the statute.

The second question presented for decision by this appeal is whether under C. S., 1140, a mortgage or deed of trust by a corporation exempts its property conveyed thereby from execution for the satisfaction of a judgment against the corporation for labor and clerical services performed by an officer of the corporation.

It is alleged in the complaint that defendant, H. F. Vass, was an officer of the Alderman Manufacturing Company, and that the services for which the judgment was recovered by him in the county court, were performed as such officer; this allegation is denied in the answer. Defendant alleges that he was an employee of said corporation, and performed clerical services as such employee. The trial court was of opinion that it was immaterial whether the judgment creditor was an officer or an employee of the corporation, and therefore, upon motion of defendant, struck said allegation from the complaint and declined to submit an issue to the jury, raised by this allegation and denial. In this there was error.

The statute manifestly, we think, applies only to judgments recovered against a corporation by an employee for labor and clerical services; it does not apply where the judgment was for salary due to or compensation earned by an officer of the corporation. The purpose of the statute is to protect employees, and not officers, who have recovered judgment against the corporation for labor and clerical services performed. An employee of a corporation has no power or authority to manage or control the corporation, nor has he ordinarily any knowledge of the financial condition of the corporation. He is merely a creditor to the extent of the amount due him for labor and clerical services. An officer, however, has both power and authority, certainly within the scope of his official duties, to manage and control the business of the corporation. The corporation conducts its business through its officers, who necessarily have full knowledge of its financial condition. They manifestly do not need the protection which the statute undertakes to afford to employees. The statute cannot be construed as affecting judgments recovered by officers of a corporation, even if such officers perform labor and clerical services for the corporation, for which judgments have been recovered.

If the jury shall find that defendant, H. F. Vass, was an officer of the Alderman Manufacturing Company, to wit, its secretary, the plaintiff will be entitled to judgment in this action, enjoining the sale of the land and other property which has been advertised by the sheriff, for sale, under the execution now in his hands, even if said defendant, as such officer, performed labor and clerical services for said corporation. If, however, said defendant was an employee of said corporation, and as such employee performed labor and clerical services, for which he has recovered judgment against the corporation, the property now owned by plaintiff, but owned by said corporation at the time such labor and services were performed, is not exempt from execution on said judgment, and the sale should not be enjoined by judgment in this action.

The issue submitted to the jury at the trial of this action in the Superior Court, and answered in the affirmative, is not determinative of the controversy between the parties to this action. The notice of defendant's claim at the sale of the property by the trustee did not affect the title which the plaintiff acquired to said property as purchaser at said sale, upon its confirmation. The property is subject to sale under execution on the judgment, upon the admitted facts in this case, if defendant, H. F. Vass, performed labor and clerical services for the Alderman Manufacturing Company, as its employee. It is not subject to such sale, if he performed labor and services for said corporation, as an officer. This is the determinative question in this action.

Plaintiff is entitled to a new trial. It is so ordered.

New trial.

PAUL JOHNSON v. CITY HOSPITAL COMPANY.

(Filed 13 February, 1929.)

1. **Hospitals—Distinction Between Charitable and Private Hospitals.**

   A charitable hospital, in aid to its general charitable purpose, may, under certain circumstances, receive patients for pay without affecting its character as a purely charitable institution.

2. **Hospitals—Charitable Hospitals—Liability to Patients.**

   A charitable hospital corporation is held to due care in the selection of suitable surgeons and employees.

3. **Hospitals—Private Hospitals—Liability to Patients.**

   A private hospital corporation operated for profit is held liable for damages to its patients resulting to them from the negligent, malicious, or wilful torts of its physicians and surgeons or other employees, occurring within the scope of their respective duties of employment.

4. **Same—Master and Servant—Physicians and Surgeons.**

   Evidence tending only to show that a physician owned a large part of the shares of stock of a private hospital corporation, and was employed by the corporation only in certain specific cases, had a private office in the institution for his separate patients, and that the plaintiff in this action was not entered as a patient in the hospital and that the hospital received no compensation from him, but that he was treated in such private office as an individual patient of the physician, is not sufficient to maintain an action against the corporation for damages resulting from alleged malpractice, there being no evidence to show that the physician acted within the scope of his duties to the corporation.

CIVIL ACTION, before *MacRae, Emergency Judge,* at May Term, 1928, of FORSYTH.

This cause was originally instituted in the County Court of Forsyth County and tried therein, resulting in a verdict for $5,000 in favor of the plaintiff. Certain exceptions were filed by the defendant and heard by the judge of the Superior Court, who overruled some of the exceptions made by the defendant and sustained others, and awarded a new trial. Whereupon, both parties appealed to the Supreme Court.

The evidence tended to show that the defendant, City Hospital Company, was a private corporation, and that at the time of the alleged injury to plaintiff, Dr. L. M. Glenn was president of said corporation and Dr. J. M. Sloan secretary thereof. These two physicians owned approximately fifty-four or fifty-five per cent of the capital stock of the corporation. They performed the duties of president and secretary in a clerical capacity only, and by agreement with the directors of the hospital were permitted to maintain private offices in the hospital building and had the exclusive right to treat all surgical cases coming to the hospital except cases involving the eye, ear, nose and throat. The fees for all such work were paid to Drs. Sloan and Glenn, and constituted no part of the revenue of the hospital. On 12 December, 1925, the plaintiff, while employed by a spinning mill, broke his arm. He consulted Dr. Foxworth, who was unable to set the arm on account of sickness, and who took the plaintiff to Dr. Glenn's office in the City Hospital. Dr. Glenn was not present at the time, and Dr. Foxworth thereupon turned the plaintiff over to Dr. Sloan for treatment. Dr. Sloan took an X-ray picture of the plaintiff's arm and thereafter put a big plaster cast thereon. Thereupon the plaintiff left the hospital and was directed by Dr. Sloan to come to his office for further treatment. Dr. Sloan maintained an office in a drug store in the city of Gastonia, and plaintiff consulted him there on two or three occasions. Finally, Dr. Sloan took the plaintiff back to the hospital and had Dr. Glenn make an X-ray picture of the arm. After examining the X-ray picture plaintiff was told by the physician that his arm was in good condition. This occurred about 10 January, 1926.

Plaintiff offered further evidence tending to show that his arm was not properly treated or set, and that as a result thereof he had been permanently injured. Dr. Sloan, who treated the plaintiff, died 10 February, 1926. The X-ray machine at the City Hospital was owned by Dr. Glenn, and the Hospital Company had no control over said machine and received no part of the charges for X-ray pictures.

The testimony further disclosed that the plaintiff was not entered as a patient of the defendant hospital and no bill was rendered him for operating room fees or otherwise.

Fred S. Hutchins and Archie Elledge for plaintiff.
Manly, Hendren & Womble and P. W. Garland for defendant.

BROGDEN, J. What is the liability of a private hospital corporation, operated for gain, for the negligence of a surgeon, who is an officer, director, and stockholder, and who maintains an office and practices his profession within the hospital?

The boundary line between the liability of hospitals operated upon the basis of charity and not for the purpose of profit or gain, and those operated for such latter purpose is clearly marked. "The principle seems to be generally recognized that a private charitable institution, which has exercised due care in the selection of its employees, cannot be held liable for injuries resulting from their negligence, and the rule is not affected by the fact that some patients or beneficiaries of the institution contribute towards the expense of their care, where the amounts so received are not devoted to private gain, but more effectually to carry out the purposes of the charity. The rule is otherwise where fees are charged with the expectation and hope of securing gain and profit and the proprietors of institutions of this class are held to the duty of ordinary care in the treatment and protection of those entrusted to them, and are responsible for injuries resulting from failure to perform this duty." *Green v. Biggs,* 167 N. C., 417, 83 S. E., 553; *Hoke v. Glenn,* 167 N. C., 594, 83 S. E., 807.

This rule of liability recognized in this jurisdiction is in accord with the prevailing weight of authority upon the subject. *Wetzel v. Omaha Maternity & General Hospital Association,* 148 N. W., 582; *Malcolm v. Evangelical Lutheran Hospital,* 185 N. W., 330; *Hayhurst v. Boyd Hospital,* 254 Pac., 528; *Meridian Sanatorium v. Scruggs,* 83 Southern, 532; *Jenkins v. Charleston General Hospital & Training School,* 110 S. E., 560; *Tulsa Hospital Asso. v. Juby,* 175 Pac., 519. The latter cases are fully annotated in 22 A. L. R., p. 341.

In the case at bar the action for damages is brought solely against the corporate defendant and not against the surgeon who, it is alleged, negligently injured the plaintiff. It is a well recognized rule of law that corporations are liable for the negligent, wilful or malicious torts of their servants or agents when acting within the course and scope of their employment. *Ange v. Woodmen,* 173 N. C., 33, 91 S. E., 586; *Cotton v. Fisheries Co.,* 177 N. C., 56, 97 S. E., 712; *Clark v. Bland,* 181 N. C., 110, 106 S. E., 491; *Sawyer v. Gilmers, Inc.,* 189 N. C., 7, 126 S. E., 183; *Kelley v. Shoe Co.,* 190 N. C., 406, 130 S. E., 32. The ultimate inquiry then, is whether or not Dr. Sloan, in treating the plaintiff, was acting as the servant or agent of the hospital corporation and within the course and scope of his employment. Clearly, the corporation would not be liable for the negligent acts of its officers merely because they were officers.

Plaintiff contends that the evidence, by correct interpretation, would show that Dr. Sloan was the agent of the corporation, and bases such contention upon substantially the following facts: Dr. Sloan was the secretary of the corporation and owned fourteen or fifteen per cent of the capital stock thereof. He maintained one of his offices in the hospital building and paid no rent for such office. Drs. Sloan and Glenn were the only physicians allowed to do surgical operations in the hospital except cases involving the eye, ear, nose, and throat. Upon the other hand, the evidence discloses that the plaintiff was never entered as a patient in the hospital, and that the hospital never charged or received any sum whatsoever from the plaintiff for treatment. The X-ray machine, which was used in making the X-ray picture of plaintiff's arm, was owned by Dr. Glenn and was set up in his private office in the hospital. The Hospital Company had no control of the X-ray machine or over the private office where it was situated. Dr. Sloan was not employed by the hospital to treat any patients and received no compensation whatever from the hospital except that he was required to pay no rent for the office which he used, such office being furnished in return for clerical services only, performed for the corporation by Dr. Sloan, who was the secretary thereof.

Viewing the facts with that liberality required by law, we are of the opinion that there is no evidence in the record tending to show that Dr. Sloan was the agent of the defendant corporation in treating the plaintiff. Indeed, the evidence discloses that the plaintiff was a private patient of Dr. Sloan, and that in treating him he was exercising an independent and individual professional judgment and skill.

The identical question involved in this case was considered by the Supreme Court of Georgia in *Black v. Fischer,* 117 S. E., 103. The Court said: "The fact that the surgeon was one of the principal stockholders in the defendant corporation would not render the corporation liable for unskillful and improper treatment of his patient; nor does the fact that the defendant company was largely under the control and management of the surgeon render the corporation liable for unskillful treatment rendered by the surgeon to one of his patients. In the petition in this case no act of the corporation is alleged to be the cause of the injuries detailed. There is no allegation that the defendant corporation undertook to direct the surgeon in the method of treatment and services which he rendered the plaintiff in this case. The allegation that L. C. Fischer was the agent and surgeon of the sanatorium company does not render the defendant company liable, without the further and necessary allegation, and the facts to sustain it, showing that the act of the agent was by the command or direction of or within the scope of the agent's employment."

The Supreme Court of Alabama considered the question in *Barfield v. South Highland Infirmary,* 68 Southern, 30. The Court said: "On the undisputed evidence the defendant corporation was entitled to the general charge which it requested and received. The medical and surgical treatment and operation were prescribed and performed by the defendant, Price, under an independent employment by plaintiff, and Price, although he was a shareholder and officer of defendant corporation, in treating and operating upon plaintiff acted not at all as the agent of said corporation nor within the line and scope of his authority as an officer. Beyond question or doubt any negligence, unskillfulness, or other wrong, if any there was, was his wrong and for it he alone was responsible."

Applying these principles of law to the facts disclosed in the record, we are of the opinion that the motion for nonsuit should have been allowed.

Reversed.

EARL FERGUSON, BY HIS NEXT FRIEND, J. F. FERGUSON, v. REX SPINNING COMPANY.

(Filed 13 February, 1929.)

Master and Servant—Master's Liability for Injuries to Third Persons—Scope of Employment.

Where a servant by his own independent act injures another servant of the employer working under him, whether wilfully or otherwise, entirely beyond the scope of his employment, and there is nothing to show that the master had actual or implied knowledge of any viciousness or recklessness of the employee committing the act, the master is not liable in damages as a matter of law for the injury thus inflicted.

APPEAL by defendant from *Townsend, Special Judge,* and a jury, at May Special Term, 1928, of GASTON. Reversed.

This is an action for actionable negligence brought by J. F. Ferguson, next friend of Earl Ferguson, his son, against defendant.

Earl Ferguson was a "doffer boy," fourteen years of age, working in the twister room of defendant's cotton mill, under Whitey Barnes, a second-hand who was over him. He was performing his duties in a place he had a right to be. The company furnished a hose with compressed air to Barnes, the force of which was 110 pounds and sufficient to blow grease and lint off of frames in the cotton mill.

Earl Ferguson testified: "Barnes slipped up behind me and grabbed my arm and raised me clean off the floor with the hose pipe. He grabbed my left arm, put the hose pipe to me with his other arm and raised me off the floor. I felt the air going in me, and I grabbed his arm, and I commenced sinking to the floor, and that was all I knew until I woke up on the spare floor."

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the minor plaintiff injured by reason of the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"2. Was the section hand, Whitey Barnes, at the time of the injuries inflicted on the plaintiff, acting within the scope of his employment? Answer: Yes.

"3. What damage, if any, is plaintiff entitled to recover of the defendant? Answer: $1,700."

Defendant introduced no evidence, and at the close of plaintiff's evidence made a motion for judgment as in case of nonsuit. C. S., 567. The motion was refused, defendant excepted and assigned error. Defendant also submitted the following prayer for instruction: "If you believe the evidence, as testified to by the witnesses, you will answer the second issue No." This was refused, defendant excepted and assigned error, and appealed to the Supreme Court.

Carpenter & Carpenter for plaintiff.
J. Laurence Jones and Geo. B. Mason for defendant.

CLARKSON, J. The material question for our determination was whether Whitey Barnes, under the facts and circumstances of this case, was acting within the "scope of his employment?" We cannot so hold.

The law, as stated in 18 R. C. L., p. 795-6, is as follows: "Acts impliedly authorized or such as are within the scope of the employment—that is, wrongs for which the employer may be held accountable—are not susceptible of precise or even very helpful definition by any phrase or short form of expression. Each case must be determined with a view to the surrounding facts and circumstances—the character of the employment and the nature of the wrongful act. Whether the act was or was not such as to be within the employment's scope is ordinarily one of fact for the jury's determination. *But if the departure from the employer's business is of a marked and decided character the decision of the question may be within the province of the court. 'Where a servant steps aside from the master's business and does an act not connected with the business, which is hurtful to another, manifestly the master is not liable for such act, for the reason that having left his employer's business, the relation of master and servant did not exist as to the wrongful act.* (Italics ours.) But if the servant continues about the business of the employer, adopts methods which he deems necessary, expedient or convenient, and the methods adopted prove hurtful to others, the employer is liable. . . . (p. 800). The rule, however, established by the later authorities does not make the responsibility of the employer depend on the question whether an injury inflicted by the employee was wilfull and intentional or unintentional, but upon the question whether the employee when he did the wrong acted in the prosecution of the employer's business, and within the scope of his authority, or had stepped aside from that business, and done an individual wrong. These decisions assert that the employer should be held responsible for the acts of his employee, when done in the course of his employment with a view to the furtherance of his employer's business, and not for a purpose personal to himself, whether the same be done wilfully and intentionally, or merely carelessly and heedlessly.' "

The injury was not committed when Barnes was using the hose for the purpose for which it was furnished; nor was the boy injured in the negligent use of the hose by Barnes, but he stepped aside and deliberately and wilfully injured the little "doffer boy." There is no evidence that defendant company knew or had reasonable ground to believe that Barnes was incompetent or had vicious propensities. In this particular as to the conduct of Barnes, he was not on duty nor in the furtherance of his employment, and used excess, but he was out of the scope of his employment.

Speaking to the subject in *Elmore v. R. R.,* 189 N. C., at p. 672, it is said: "In *Ange v. Woodmen,* 173 N. C., p. 35, *Hoke, J.,* citing a wealth of authorities, says: 'It is now fully established that corporations may be held liable for negligent and malicious torts, and that responsibility will be imputed whenever such wrongs are committed by their employees, and agents, in the course of their employment, and within its scope.' *Munick v. Durham,* 181 N. C., 193. In *Cook v. R. R.,* 128 N. C., 336, it was said: 'Acting within the general scope of his employment means while on duty, and not that the servant was authorized to do such acts.' *Gallop v. Clark,* 188 N. C., 186; *Sawyer v. Gilmers, Inc., ante,* 7; *Southwell v. R. R., ante,* 417; *Seward v. R. R.,* 159 N. C., 241; *Cooper v. R. R.,* 170 N. C., 492; *Cotton v. Fisheries Products Co., supra* (177 N. C.), 59; *Jenkins v. Sou. R. R.* (S. C.), 125, S. E. Rep., 912."

We do not see how defendant company could reasonably anticipate that Barnes would go out of his way and commit the assault on the little boy.

In *Rivenbark v. Hines,* 180 N. C., at p. 243, it is said: "He (Walton) had quit work to go to dinner, and was blowing off the dust from his clothing as was usual among the employees. The boy, Rivenbark, was familiar with this process, and asked Walton to blow the dust off his clothes. Walton did this, and when the boy turned his back Walton forcibly seized him and wantonly and recklessly blew the air through the boy's rectum into his body and killed him. Upon these facts Walton was guilty of manslaughter, and had he not died, doubtless he would have been punished for it. In no view can he be said to have been acting within the scope of his employment or in the service of the defendant. The case differs very materially from *Robinson v. Mfg. Co.,* 165 N. C., 495."

The humanities of the case are appealing, but we cannot be led to take unjustly from one and give to another. Barnes was guilty of a cruel assault and liable in damages to plaintiff, but we cannot hold the defendant liable for his unauthorized conduct beyond and outside of the scope of the employment. Those who in the years that have gone by enacted a wise oath "Will administer justice without respect to persons and do equal right to the poor and the rich."

We have heard the argument of plaintiff and read the well prepared brief and have carefully considered the case, but we are of the opinion that the judgment of nonsuit should have been sustained and the prayer of instruction given.

For the reasons given the judgment of the court below is

Reversed.

B. P. GRANT v. TALLASSEE POWER COMPANY.

(Filed 13 February, 1929.)

1. **Trial—Taking Case or Question from Jury—Nonsuit—Waiver.**

   A defendant waives his right to object to the sufficiency of the evidence on his motion of nonsuit made at the close of the plaintiff's evidence by introducing evidence in his own behalf and not renewing his motion after the close of all the evidence in the case. C. S., 567.

2. **Appeal and Error—Assignment of Errors—Form and Requisites of Assignments—Rule of Court.**

   An exception not set out in the appellant's brief, nor citing authority sustaining it is taken as abandoned on appeal.

3. **Trial—Issues—Submission of Issues—Instructions.**

   Where the defendant does not submit issues presenting its contention that the flooding of the roads upon which plaintiff was dependent for access to his land was lawful because authorized by the county commissioners or the township highway commissions, assignment of errors to the charge in this respect will not be sustained.

4. **Trial—Issues—Issues Raised by Pleadings and Evidence.**

   In an action to recover damages caused by flooding public roads upon which plaintiff was dependent for access to his land, where there is no contention that such road was private, the question of plaintiff's right to use such road by adverse use is not presented.

APPEAL by defendant from *Moore, J.,* at September Term, 1928, of GRAHAM. No error.

Action to recover for damage to plaintiff's land, caused by the flooding of certain roads, the only means of access to the same, by the construction of a dam. Plaintiff's land is located on a mountain side, and is valuable chiefly because of the timber standing and growing thereon. As the result of the construction of said dam by defendant, and the flooding of said roads, the said land and timber are now inaccessible. It is impracticable to remove the said timber from the said land, for the purpose of marketing the same, because of the destruction of said roads.

The issues submitted to the jury were answered as follows:

"1. Did the defendant wrongfully destroy plaintiff's means of access to and from his boundary of land by flooding and submerging the roads leading to plaintiff's land, as alleged in the complaint? Answer: Yes.

"2. Were the means of ingress to and egress from plaintiff's land injured by the defendant's flooding and submerging said roads, as alleged in the complaint? Answer: Yes.

"3. What damage has the plaintiff sustained by reason of such injury? Answer: $816.00."

From judgment that plaintiff recover of defendant the sum of $816.00, interest and cost, defendant appealed to the Supreme Court.

T. M. Jenkins and M. W. Bell for plaintiff.
S. W. Black and R. L. Phillips for defendant.

CONNOR, J. Defendant has waived its exception to the refusal of the court to allow its motion for judgment as of nonsuit, made at the close of plaintiff's evidence. Defendant excepted to the refusal of its motion, and then offered evidence in support of its defense to plaintiff's recovery. By the express terms of the statute, this exception was thereby waived. C. S., 567. It has been frequently so held by this Court. *Gilland v. Stone Co.,* 189 N. C., 783, 128 S. E., 158; *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356; *Wooley v. Bruton,* 184 N. C., 438, 114 S. E., 628; *Smith v. Pritchard,* 173 N. C., 722, 92 S. E., 257. Defendant did not renew its motion at the close of all the evidence. In *Wooley v. Bruton, supra,* it is said by *Clark, C. J.:* "The motion for nonsuit at the conclusion of plaintiff's evidence, was waived by the introduction of evidence by the defendant, and the failure to renew the motion on all the evidence."

Defendant's assignment of error based on this exception cannot be considered on its appeal to this Court. If, however, the exception had been properly presented to this Court, upon the record, it would under our Rule be deemed abandoned. The exception is set out in defendant's brief, but no authority is cited, nor is any argument advanced in its support. For this reason, under our Rule 28, the exception is taken as abandoned in this Court. The ruling of the trial court upon defendant's motion at the close of plaintiff's evidence for nonsuit, is not presented for review by this Court.

Plaintiff's land is located on a mountain side; it is valuable chiefly for the timber standing and growing on it. The value of the timber is dependent on its accessibility. Prior to the construction of defendant's dam, the land and timber were accessible by means of a road, which ran within 200 yards of the land on which the timber is located, and of cartways running from this road to the land. The land did not reach to or abut on the road, which plaintiff alleges was a public road. There was evidence tending to sustain this allegation. The road and the cartways leading therefrom to plaintiff's land were flooded by water ponded thereon by the dam. The water did not flood plaintiff's land, or any part thereof, but it did flood and submerge the road and cartways, destroying them as means of access to plaintiff's land. Whether or not, as a matter of law, upon these facts, plaintiff is entitled to recover in this action, is not presented for decision by this appeal. We, therefore, do not decide the question as to whether or not a landowner, who is dependent on a public road for access to his land, can maintain an action for damages, for the wrongful obstruction of the road, resulting in damages to his land. There are decisions of courts of other jurisdictions which seem to support recovery of damages in such cases. In 29 C. J., at pages 631 and 632, it is said that an action for damages against one who injures a public highway may be maintained by a private person, if he has sustained special damages, differing not merely in degree, but in kind from that suffered by the community at large, as where access to plaintiff's property is cut off. Many decisions are cited in support of the text. As the question is not presented on this appeal, we do not decide it. It would seem, however, that plaintiff sustained special damages in this case, caused by defendant's flooding the road and cartways upon which he was dependent for access to his land.

We find no reversible error in the rulings of the trial court upon objections to the admission or rejection of evidence. Assignments of error based on exceptions to such rulings cannot be sustained. There was ample evidence to sustain the verdict, and if it be conceded that there was error in some of the rulings to which defendant excepted, it is manifest, we think, that such error was not prejudicial. No issue or issues were tendered by defendant presenting its contention that the flooding of the roads upon which plaintiff was dependent for access to his land and timber was lawful, for that same was authorized by the commissioners of Graham County or by the highway commissioners of the townships in which the roads were located. Defendant's contention in this respect was predicated upon the fact that the roads which were flooded by it were public roads, under the control of the road authorities of the county or townships. For this reason assignments of error based upon exceptions to the charge cannot be sustained.

It is well settled, of course, in this State, that the right to a private way over and across the land of another may be acquired as against the owner of the land, by a continuous adverse use for twenty years, and that a mere user for the required period is not sufficient to confer the right. *Weaver v. Pitts,* 191 N. C., 747, 133 S. E., 2; *Snowden v. Bell,* 159 N. C., 497, 75 S. E., 721. This principle has no application to the instant case. There was no contention here that the road, which defendant destroyed by flooding it with water ponded by its dam, was a private way. Defendant's contention was that it acquired the right to flood the road, from the board of commissioners of the county or from the highway commissioners of the townships in which the road was located.

We find no error for which defendant is entitled to a new trial. For its own profit, it has destroyed, or at least greatly diminished, the value of plaintiff's land. Upon all the evidence, the amount assessed by the jury is fair and reasonable. The judgment is affirmed. There is

No error.

K. L. BURNETT v. J. M. WILLIAMS AND J. E. FULGHAM, PARTNERS, TRADING AS WILLIAMS & FULGHAM LUMBER COMPANY.

(Filed 13 February, 1929.)

Trial—Taking Case or Question from Jury—Nonsuit.

Where there is any legal evidence sufficient to support the plaintiff's action, defendant's motion as of nonsuit thereon will be dismissed; and *Held*, in this case the evidence was sufficient to be submitted to the jury.

APPEAL by Williams & Fulgham Lumber Company from *Deal, J.*, and a jury, at May Term, 1928, of HAYWOOD. No error.

It was agreed between the parties, although the action was instituted against the defendants, as partners, trading as the Williams & Fulgham Lumber Company, that in reality the company is a corporation and that this action be continued to final judgment as if it had originally been instituted against the said corporation.

The action was instituted by the plaintiff to recover from the Williams & Fulgham Lumber Company $420, two years interest from 17 March, 1920, to 17 March, 1922, due on $3,500.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Did the defendant, Williams & Fulgham Lumber Company, assume the payment of the interest of the $3,500 note from 17 March, 1920, to 17 March, 1922, in the sum of $420, as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff, K. L. Burnett, prior to the institution of this action, pay said interest? Answer: Yes."

The material evidence and assignments of error will be set forth in the opinion.

Morgan & Ward and M. G. Stamey for plaintiff.
Rollins & Smathers for defendant.

CLARKSON, J. The principal question in dispute is: Did K. L. Burnett assign the contract of 17 March, 1920, to C. K. Peacock or to Williams & Fulgham Lumber Company? If he assigned it to C. K. Peacock, having contracted in writing to pay the interest on the $3,500, then the plaintiff, Burnett, is liable for the $420 interest. If Burnett assigned the contract to Williams & Fulgham Lumber Company, then the lumber company has to pay the interest.

The defendant, at the close of plaintiff's evidence, and at the close of all the evidence, made a motion for judgment as in case of nonsuit. C. S., 567. The court below overruled the motions, and in this we think there was no error.

Without repeating the voluminous evidence, we think it was sufficient to be submitted to the jury on both issues. The probative force was for them. Under all the facts and circumstances of this case, we cannot say that the statements attributed to John Williams, admitted on behalf of plaintiff, were incompetent or prejudicial. The jury could, under all the evidence, have decided with either party. There was a sharp conflict, but the evidence on the part of plaintiff was sufficient to be submitted to them for their consideration.

Defendant in its brief well says: "Evidence that raises a mere suspicion or is conjectural or speculative is not such legal evidence as requires the submission of it to the jury, and such evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict and should not be left to the jury. *S. v. Vinson,* 63 N. C., 335; *S. v. Bridgers,* 172 N. C., at p. 882; *Rice v. R. R.,* 174 N. C., 270." See, also, *S. v. Prince,* 182 N. C., 788; *S. v. Montague,* 195 N. C., 20; *S. v. Swinson, ante,* at p. 103.

The evidence in this action, outside of facts and circumstances favorable to plaintiff's contention, as we construe the language, is the positive evidence for plaintiff on both issues.

Forest Justice, a witness for plaintiff, testified, which was not objected to by defendant: "Q. Did Mr. Burnett ever tell you how he came to get out from up there? Did he tell you he sold out to Mr. Peacock? A. Mr. Burnett told me he sold out to Williams & Fulgham Lumber Company."

K. L. Burnett testified: "I did not have any contract with Peacock. After making this contract with Rogers Brothers, I assigned the contract in writing to Williams & Fulghum Lumber Company. This is the assignment on the paper. (Handed paper to witness.) That is C. K.

Peacock's handwriting. When I signed it, it read just like this: 'I hereby assign the above contract, my title and interest in same, to J. E. Fulgham, of Asheville, N. C., W. and F. L. Co., they assuming the same,' and that is my signature under it.

"Q. Mr. Burnett, I notice that the J. E. Fulgham, of Asheville, N. C., and W. & F. L. Co. has a pencil mark through it and above that it is written C. K. Peacock. I wish you would state what you know about that pencil line or C. K. Peacock's name being inserted. Was that line or C. K. Peacock's name inserted when you signed it? A. No, sir, it was not.

"Q. I wish you would state if you gave anybody permission to strike out W. & F. L. Co. and insert C. K. Peacock? A. No, sir."

W. & F. L. Co. would naturally be construed to mean defendant Williams & Fulgham Lumber Company.

These matters were denied by defendant, but of course are not for us to determine, but for the jury.

In *S. v. Lawrence, ante,* at p. 578, speaking to the subject, it was said: "It is sometimes difficult to determine what is and is not sufficient evidence to be submitted to a jury. Under the Constitution of this State, this Court has jurisdiction upon appeal to review any decision of the courts below 'upon any matter of law or legal inference.' It is the province of the jury to determine the facts and that of the court to state the law. The right of trial by jury has ever been closely allied with the cause of human liberty."

We have examined the exceptions and assignments of error, and think they are untenable. We can find

No error.

W. H. HALL ET AL. v. F. M. REDD ET AL.

(Filed 13 February, 1929.)

1. Municipal Corporations—Public Improvements—Parks and Recreation Grounds.

Where the commissioners of a city have purchased lands tacitly or expressly for the purpose of a public park, and have sold the same and turned the proceeds over to a city park and recreation commission created by statute, an action brought to require the defendants to place in the city treasury the sum so paid is an affirmance of the city's right to have purchased and to have sold the lands; and *Held further*, that the transaction having been completed, the question has become academic.

2. Same—Taxation Without Vote of People.

Where a city sells land used for recreation purposes and turns the proceeds of the sale over to its park and recreation commission the action is not a pledging of its faith and credit so as to involve the imposition of a tax, and our constitutional provision requiring a vote of the people for the levy of a tax except for necessary expenses is inapplicable, Art. VII, sec. 7, and this result is not affected by the fact that the statutory park commission was limited in its annual expenditures to an amount to be derived from a certain *ad valorem* tax.

APPEAL by plaintiffs from *Harding, J.*, at June Term, 1928, of MECKLENBURG.

Civil action brought by plaintiffs to require the defendants to place into the treasury of the city of Charlotte the sum of $42,851.65, the amount derived from the sale of certain park lands and turned over to the "Charlotte Park and Recreation Commission" to be used in acquiring or accepting other lands and making permanent improvements with respect to parks and playgrounds managed and controlled by said commission in the interest of the citizens of the city of Charlotte.

In 1923 the city of Charlotte purchased a tract of land from Sallie S. Anderson, known as the Irwin Creek property, with the tacit, if not express, understanding that said property should be used for park purposes.

In 1927 this land was sold and the proceeds derived therefrom were, by resolution of the commissioners of the city of Charlotte, turned over to the Charlotte Park and Recreation Commission, a corporation created by chapter 51, Private Laws 1927, and charged with the management and general supervision, in the interest of the public, of parks and playgrounds within or near the city of Charlotte, etc.

The act creating the "Charlotte Park and Recreation Commission" was approved by a majority vote of the qualified voters of the city of Charlotte. This act provides for an annual *ad valorem* tax levy, for park purposes, of 2 cents on each hundred dollars of assessed property in the city of Charlotte, to be turned over to said Park and Recreation Commission; but the commission has no "power to contract any debt or incur any obligation in excess of the amount of taxes levied by the governing body of the city of Charlotte for park purposes for the current year." It is the contention of the plaintiffs that, under this limitation, the appropriation of said funds is unlawful, and that the same should be covered back into the treasury of the city of Charlotte.

From a verdict and judgment denying to plaintiffs the relief sought, plaintiffs appeal, assigning errors.

J. F. Flowers and H. L. Taylor for plaintiffs.

Carol D. Taliaferro, Frank W. Orr and Jno. A. McRae for defendants.

STACY, C. J. While the plaintiffs in their brief would repudiate the sale and purchase of the Irwin Creek property in 1923 as unlawful, yet their suit is in affirmation of the purchase of said property. They are now seeking to recover for the city of Charlotte the moneys derived from a sale of said lands. Furthermore, that has long since become an executed transaction, and the question would seem to be academic. *Torrence v. Charlotte,* 163 N. C., 562, 80 S. E., 53; *Harrison v. New Bern,* 193 N. C., 555, 137 S. E., 582.

Nor can the limitation on the power of the Park and Recreation Commission "to contract any debt or incur any obligation in excess of the amount of taxes levied by the governing body of the city of Charlotte for park purposes for the current year" be held to prohibit the commissioners of the city of Charlotte from appropriating funds already in hand, derived from the sale of park property, for park purposes, or for a legitimate public use. *Adams v. Durham,* 189 N. C., 232, 126 S. E., 611; *Berry v. Durham,* 186 N. C., 421, 119 S. E., 748. It is not proposed that the municipality shall contract any debt or loan its credit so as to involve the imposition of a tax. Hence, this renders Article VII, section 7, of the Constitution, requiring a vote of the people, except for a necessary expense, inapplicable. *Brockenbrough v. Commissioners,* 134 N. C., 1, 46 S. E., 28; *Gardner v. New Bern,* 98 N. C., 228, 3 S. E., 500.

The record presents no exceptive assignment of error of sufficient merit to warrant a new trial or a reversal of the judgment.

No error.

JESSIE D. CATES CLARK AND JOHN M. CLARK, HER HUSBAND, v. LAUREL PARK ESTATES, INC., STRADLEY MOUNTAIN DEVELOPMENT CORPORATION, AND CENTRAL BANK AND TRUST COMPANY, TRUSTEE.

(Filed 13 February, 1929.)

1. **Trial—Instructions—Construction.**

Under the rule that a charge of the court to the jury will be construed contextually as a whole, unconnected excerpts from the charge appearing of record as exceptions is not sufficient.

2. **Cancellation and Rescission of Instruments—Right of Action and Defenses—Fraud—Deeds.**

When a land development company has platted a large area of land to be sold into lots, and represents that it has money in the bank to pay for street and other improvements, including the erection of a fine hotel, and relying on these representations and induced thereby one has purchased a lot of the land so situated as to be more largely benefited in regard to its location near the hotel, under written assurance from the owner that he as a representative of the company would sell the lot at a profit so as to save the purchaser harmless: *Held,* the failure of the company to fulfill these material promises is sufficient evidence of the fraudulent intent of the promisor to be submitted to the jury and to sustain their verdict for rescission of the contract, and the purchaser may recover the moneys he has paid in the transaction.

3. **Election of Remedies—Affirmance of Contract by Acting Thereunder—Notice of Fraud—Deeds.**

A purchaser of a lot in a scheme for the development of a large tract of land is put to his election to rescind the contract for fraud within a reasonable length of time after the discovery of fraud, or to affirm it by accepting its benefits and by making payment on the purchase price and paying interest when it becomes due, but it is not alone a sufficient affirmance of the contract under circumstances wherein it will appear that this was done without knowledge, actual or constructive, of the fraud practiced upon him.

4. **Cancellation or Rescission of Instruments—Right of Action and Defenses—Right to Rescission in General.**

In order for the plaintiff to be entitled to the equitable relief of rescission of a contract for fraud he must be in a position to put the parties in *statu quo* by restoring the benefits received thereunder.

5. **Bills and Notes—Actions—Evidence and Burden of Proof of Acquisition as Bona Fide Purchaser Without Notice.**

Where a negotiable note is in the hands of a holder properly endorsed to him it is prima facie evidence that he is holder in due course without notice of any infirmity in the instrument, subject to rebuttal, but where there is evidence of fraud in its procurement, the burden is upon such holder to prove that he had acquired the instrument as a bona fide purchaser in due course and without notice, and on conflicting evidence the fact is for the jury to determine.

6. **Same—Evidence of Knowledge of Fraud.**

Where there is evidence that a trustee in a deed of trust of lands in a development scheme held for the benefit of the owners of the land by the recitations in the deed of trust and other conveyances relating to the sales, and by the declaration of the trust officer of the trustee corporation, and evidence *per contra* that the property was held in trust for bondholders having money in the development company, and the trustee knew, or by reasonable inquiry should have known, of fraud practiced in the sale of the lots by the development company, and has in its provisions the notes secured by mortgage endorsed to it by the development company, the question of its being a holder in due course is one for the jury.

Held, the evidence that the holder of the negotiable instruments in this case had knowledge of the fact that the same were procured by fraud or had knowledge of facts which should have put him on reasonable inquiry which would have discovered the fraud is sufficient to be submitted to the jury.

APPEAL by defendant, Central Bank and Trust Company, trustee, from *Sink, Special Judge,* and a jury, at May Special Term, 1928, of BUNCOMBE. No error.

This is an action brought (1) against defendant, Laurel Park Estates, Inc., for actionable fraud and rescission for judgment for the money paid it—$1,250 purchase price and $112.50 interest—by plaintiff, Jessie D. Cates Clark; (2) against Central Bank and Trust Company, trustee, that held certain negotiable notes involved in the transaction be canceled. The controversy was over the purchase of a lot from Laurel Park Estates, Inc., for $5,000 on 28 June, 1926. The sum of $1,250 was paid in cash and three notes of $1,250 each, due in 12, 18 and 24 months, given for the balance. The Central Bank and Trust Company, trustee, denied any knowledge of fraud and set up the defense (1) That said Laurel Park Estates, Inc., duly endorsed, transferred and delivered to the defendant, Central Bank and Trust Company, as trustee, for value, and before maturity, the said three notes and the said defendant, Central Bank and Trust Company, as trustee, is now the bona fide holder of said notes. (2) That, in recognition of the validity of said three notes, and of the fact that the same were held by said Central Bank and Trust Company, as trustee, plaintiffs, on 29 December, 1926, paid to defendant, Central Bank and Trust Company, the semiannual interest which was due and payable on said three notes on 28 December, 1926. (3) That plaintiffs failed and refused to pay the semiannual interest which became due and payable on said three notes on 28 June, 1927, and also failed and refused to pay the said note which became due and payable on 28 June, 1927, and defendant, Central Bank and Trust Company, as trustee, has, therefore, pursuant to the terms of said notes, declared the full amount of the principal and interest of all of said notes due and payable and thereby, plaintiffs became indebted to the said defendant, Central Bank and Trust Company, as trustee, in the sum of $3,750, with interest thereon from 28 December, 1926, no part of which has been paid, and all of which is now justly due and owing, and demands judgment against plaintiffs for the amount and interest.

Defendant, Central Bank and Trust Company, trustee, contended that said three notes executed by the plaintiffs were delivered to it immediately after they were executed by plaintiffs, in consideration of Central Bank and Trust Company, as trustee, executing and delivering a release deed, releasing the lot purchased by plaintiffs from the lien of two deeds of trust securing indebtedness aggregating in principal amount $700,000, and that it held said notes as trustee as security for the payment of said bonds and notes secured by said deed of trust aggregating in principal amount $700,000. The defendant, Laurel Park Estates, Inc., filed no answer.

Jessie D. Cates Clark and her husband, John M. Clark, live in Maryville, Tenn. Two sales agents of the Laurel Park Estates, Inc., in June, 1926, had plaintiffs to visit Asheville. They came in a public taxi and their expenses were paid by the agents. They were met at Kenilworth Inn by another agent. John M. Clark testified in part: "He entertained us, stayed with us, took us to places of amusement. Afterwards he took us back to the hotel and we were assigned rooms. Next morning he came and guided us out to Stradley Mountain and showed us the Stradley Mountain property. While we were out there *they gathered the parties together and on top of the mountain* had a lecture delivered by another agent. This agent said this property was being developed and that *he had been all over the world,* and that this was *the most beautiful spot* he had ever seen for a development. He then described what the developments were to be, the paving of the streets, putting in water, lights, telephones, sewers, building of a hotel, building of a golf course, a clubhouse, schoolhouse, and certain portions were to have business properties on them. The business section was down near the roadway leading past the property. Electric lights, golf course, and hotel were promised. He said the hotel was under contract and would be there by the first of the year following. It was to cost a million dollars or more. He said the money for these improvements was in the Central Bank and Trust Company, of Asheville. While we were on the mountain they had a band concert and this lecture and a luncheon. Several announcements were made from a megaphone down below from their little office, saying 'Sold.' This was done several times. The date of this was 17 and 18 of June. The agent that met us at Kenilworth Inn attended us first, then turned us over to Harry W. Hoff, general director of sales. I saw him on the ground and talked to him. . . . He was director of sales for Laurel Park Estates, Inc., according to his statement. I saw him direct the sales. He reiterated the claims that the lecturer had stated. He insisted on my wife buying a certain lot, and told of the money that was in the bank to do all these improvements, and insisted on the safety of the investment, but we were not impressed with all this so much until he said, 'To be sure that your money is safe, I will guarantee to refund it or resell it at a profit.' I have the original sales contract. I saw him sign it on the back that day. I saw Mr. Harry W. Hoff write on the back of the contract. It was written at the little office on the mountain."

The following was signed by Hoff: "This property is sold with the specific agreement that we will resell same (if requested by the buyer) at a profit, prior to date when next payment comes due, or refund purchase price with interest at 6% and cancel the sale. Harry W. Hoff, general director sales, Stradley Mountain Park."

John M. Clark further testified: "This little house where this was written is the same place the megaphone calls came up 'Sold.' Mr. Hoff gave me a plat when we closed the sale. He had the red ink mark put on lot 7, on the plat, the one we purchased. The name of the hotel that was to be erected on top of the mountain was Lafayette Chateau. . . . Mr. Hoff and the other agent that met us at Kenilworth Inn pointed out just where the hotel was to be built on top. The hotel was to be on the crest of the mountain. The lot, No. 7, was in the block below, about three or four hundred feet from the hotel site. With reference to the little house where the megaphone calls came from, about this point (pointing). After we signed the contract to purchase the lot we were brought back to Kenilworth Inn; the taxi was waiting and we left immediately for Maryville. The notes we signed were mailed us from the office of Laurel Park Estates, Inc. Before we left we paid to Mr. Hoff at the office on the ground $1,250, by check. We signed the notes that were sent us by mail because of the contract and because of the representations that were made by the agent. The agents stayed with us all the time we were here, except when we were in our rooms. I wouldn't have signed the notes had it not been for the representations about the hotel and improvements and what they were going to do and the money on deposit to do it with because I wouldn't have thought it would have been value received. This took place in June, 1926. I went out there about last Thursday and I did not find a hotel and paved streets and improvements, but I found conditions very much worse than they were when we were there. Streets that had been graded were washed into gulleys now. The land next to the road is open fields; further on up the mountain there is scrubby pine, and at the top a little cleared place. The fields and forests are in about the same condition as when we were there before. The roads haven't been paved. The music, the lecturer, and pavilion are not there now. The writing that had been handed me came to my wife through the mail some time the latter part of June, 1926, or July."

Plaintiffs introduced in evidence a warranty deed from Laurel Park Estates, Inc., to Mrs. Jessie D. Cates Clark (wife of John M. Clark), of Maryville, State of Tennessee, covering the property purchased by the plaintiff and recorded in Book 350, at p. 64.

Plaintiffs also introduced in evidence a deed of release from the Central Bank and Trust Company, trustee, to Mrs. Jessie D. Cates Clark, releasing the lot purchased by her. The release recites (1) a deed in trust from Stradley Mountains, Inc., dated 1 March, 1926, duly registered to Central Bank and Trust Company, trustee, to secure certain indebtedness (2) on the same date a deed from Stradley Mountains, Inc., certain land including the lot in controversy to defendant Laurel Park Estates, Inc., (3) on the same date, deed in trust from Laurel

Park Estates, Inc., to Central Bank and Trust Company, trustee, certain lands, including the lot in controversy duly registered.

While on *top of Stradley Mountains,* the agent handed plaintiffs a circular which in part is as follows:

"*Stradley Mountain Park* is marked for success. Its location, accessible and yet removed, is the obvious site for a community of homes. Its appeal is instantaneous and lasting; its beauty inspires a longing for a home in the sunlit slopes. Sunshine is desirable in the selection of one's home site, but sewage disposal is more important. A complete sanitary system will be a part of Stradley Mountain Park. Water will be brought from the Mt. Pisgah watershed. Hard-surfaced roads, street lights and underground wiring for telephone and electric connections are being installed. A Donald Ross golf course, clubhouse and other conveniences will make Stradley Mountain Park a complete suburb.

"*Stradley Mountain Park* is presented by developers proud of its natural beauty, definitely assuring improvements in keeping and intent on giving to Asheville the outstanding residential suburb of Western North Carolina, a suburb in which the freedom of the country shall be blended adroitly with the convenience of the city.

"*Stradley Mountain Park* is truly 'overlooking Asheville. Tree-clad slopes command an incomparable view of the plateau. Beyond, the mountains fade into the heaven's blue; below, the bright city which is Asheville lies cool and clear. And a black ribbon of asphalt slips through grassy hills from the foot of Stradley Mountain to the city fifteen minutes away.'

"*Purchasers in Stradley Mountain Park* acquire more than a plot of land; they become shareholders in the prosperity of Asheville, privileged dwellers where climate, sun and scenery pay dividends in added years, greater health and increased happiness. Country clubs, horseback trails, fine motor roads, trout streams, and the camp grounds of Pisgah National Forest are bringing about a keener appreciation of Western North Carolina's claim of 'The Nation's Playground.' Recreation plays an enormous part in modern life. And Asheville is recreation freely offered, but in close harmony with industrial opportunity. Stradley Mountain Park is this and more—a quiet detachment from the noise of the city."

The witness further testified: "At the time the interest was paid on the notes in December, the first interest, I knew that the improvements had not been made, but did not know definitely that they were not going to be made. My wife paid about $112.50 interest in December to the Central Bank and Trust Company. Before I started this suit I demanded a refund of this interest. I made investigation to see if the money is now on deposit with the Central Bank and Trust Company, for the purpose of making the improvements. Mr. Barnard, of the Central Bank and Trust Company, stated that the money that was there is not there. My understanding is there is no money on deposit there for this purpose. I have offered to reconvey this property to Laurel Park Estates, Inc., and they refused to accept a deed and pay me the money. . . . We went to the grounds the morning after we arrived here. They were having a band concert and a lecture. I listened to the lecture. I executed three notes along with my wife. . . . I had a conversation with Mr. C. W. Brown, trust officer of the Central Bank and Trust Company with reference to how he held these notes. He told me he held them in trust for the Laurel Park Estates, Inc., and Stradley Mountain Development Corporation. I made inquiry from the trust officer as to the $215,000 and what was done with it. I first asked Mr. Brown and he said it was still in the bank—a portion of it. Some of it had been spent out there at the time of our purchase. The remainder was in the bank. Later I asked Mr. Barnard about it, and he said that they had applied it on the notes—on the bonds, the first mortgage bonds. He didn't say he had any left for improvements."

The attorney who fixed the papers wrote to plaintiff, Mrs. Jessie D. Cates Clark: "As attorney for the Laurel Park Estates, Inc., owners and developers of Stradley Mountain Park, I am herewith enclosing deed of trust and notes covering the lot which you purchased in Stradley Mountain Park. . . . If, however, you do not wish to forward the deed of trust and notes to me, mail the same to the trust department of the Central Bank and Trust Company, and sign the enclosed letter addressed to that officer, and the deed will be placed there for delivery to you upon receipt of the notes and deed of trust properly signed and executed."

Mrs. Jessie D. Cates Clark testified in part: "My husband and I brought this case jointly. After my husband and I came to Asheville we saw the agent. He was representing the Laurel Park Estates, Inc. He took charge of us entirely. The night we came he took us to a band concert on the Plaza. Next morning he took charge of us and started to Stradley Mountain, Laurel Park Estates, Inc. He took us to the crest and we heard a lecture. He told us of his travels; that he had been everywhere in the world, and that this was the most wonderful sight he had ever seen, and told us of the wonderful improvements that were to be made there. He said on the crest was to be a hotel called Lafayette Chateau, which would cost about a million or two million, then of the streets being paved and the sidewalks and the lights and water, and everything was to be underground which could be put underground, and then of lakes and parks and things of that kind. There was to be a golf course and all those things that go to make a beautiful place. The contract was to be let and the hotel constructed by the first of the year. The money was all ready in the Central Bank and Trust Company. After the lecture we heard the words 'Lot Sold' megaphoned from a little house below. It seemed they were selling lots fast. He took us on down after that—down around the same driveway and right in front of the only two lots he said were available there. He went and got Mr. Hoff, and he came and told us of all the wonderful improvements that were to be made there. Just above the roadway was the crest where the Chateau should stand, then just below that was my lot, and they made it very plain that it was quite an advantage to be so near the handsome hotel. Mr. Fout loaned me the money to pay for the lot. The cash payment was $1,250. I signed the notes and deed of trust and bought this property because of Mr. Hoff's alluring portrayal of the wonders that were to be made there. I would not have bought the property had those representations not been made. I went out there the other day to see if the improvements had been carried out. There is no paving there, and it is just a waste place grown up with scrubby pines. There are no telephone lines—not a thing in the world. The deed was mailed to me by Mr. Walton. There was a letter from Mr. Walton that accompanied the deed. . . . . We requested Laurel Park Estates, Inc., to resell the property for us. They have not sold it. We have offered to reconvey the property to them and demanded our money and interest back. I paid $112.50 interest in December. At that time I did not know that they did not have the money in the bank for these improvements. I am willing to convey this property back, if ordered. This circular was handed to me and my husband. I believed the things that appeared to be on there and the representations as to what they would do. If I had known they did not have the money to complete the improvements, and that the property would not be improved, I would not have purchased the property."

One of the agents of the Laurel Park Estates, Inc., C. J. Brown, who lived in Maryville and brought plaintiffs to Asheville, corroborated plaintiffs, and further testified: "The lecturer said it was the greatest location, one of the prettiest places he had ever seen, would be one of the finest resorts, and that all of these things were absolutely guaranteed. Joe Hanson and Hoff, sales managers of the Stradley Mountain Development Company, Inc., or Laurel Park Estates, Inc., told me that Laurel Park Estates, Inc., had taken over the Stradley Mountain business."

The trust deed made to defendant Central Bank and Trust Company, trustee, in which the lot in controversy was included, which said trust released to Mrs. Clark contained this provision: "Before releasing any of said real estate, however, the trustee shall require the party of the first part to file with it a certificate, duly signed and verified by one of its officers, stating that it is not in default in the performance of any of the terms and covenants of this indenture, and that it has sold the property so to be released for a consideration representing, in the opinion of the signer of such certificate, its full value to the party of the first part, which consideration may be (1) cash, or (2) partly cash and partly obligations secured by purchase-money mortgage or deed of trust to Central Bank and Trust Company, as trustee, upon the property so sold and to be released."

By the terms of the trust the bank was authorized to release lots therefrom upon being paid "50% of the purchase price of the property so sold, provided in no event should the amount paid for each release be less than a sum equal to $1,000 per acre." By the terms of the trust it was further required that to obtain release of lots or fractions of an acre that there should be a payment made "at the rate of $1,000 per acre." C. W. Brown was the principal trust officer of the defendant, Central Bank and Trust Company; Bascom Barnard was its associate trust officer. Mr. Barnard testified in the case that the release of the lot to Mrs. Clark was handled by Mr. C. W. Brown. Mr. Brown testified: "I don't remember the particular notes involved in this suit."

The plaintiffs introduced the deed of release of lot No. 7 by Central Bank and Trust Company, which contained the following clause: "Now, therefore, in consideration of a sum of money sufficient under the terms of each of said deeds of trust to entitle the said party of the second part to a release of the land hereinafter described from the lien and effect of said deed of trust." The land in controversy was about eight miles from Asheville.

Upon objection of the attorneys for the defendants, Central Bank and Trust Company, and Stradley Mountain Development Corporation, the court ruled that the testimony of witnesses as to statements made by the agents while the witnesses, Mr. and Mrs. Clark, plaintiffs in this action, were in Asheville, was not competent as to the two defendants, Central Bank and Trust Company, trustee, and Stradley Mountain Development Corporation, and would not be considered as to these defendants, but that it was competent only as to the defendant, Laurel Park Estates, Inc., who had not answered and whose case was before the court on default and inquiry. The same ruling was applied to the testimony of C. J. Brown.

The court below instructed the jury: "The court instructs the jury that the defendant, Laurel Park Estates, Inc., not having answered, and from the evidence introduced, if the jury believe the same, under the definition of fraud and instructions later to be given, will answer the first issue Yes, and the second issue $1,250, and interest from the date of payment." Defendant, Central Bank and Trust Company, trustee, excepted and assigned error.

The defendant, Central Bank and Trust Company, trustee, tendered the following prayer for instruction: "Defendant, Central Bank and Trust Company (trustee), requests the court to instruct the jury that if they find the facts to be as shown by the evidence introduced, and the testimony of the witnesses, they shall answer the third issue 'Yes,' and the fourth issue 'Three thousand, seven hundred and fifty dollars, with interest thereon from 28 December, 1926.'" The court below refused to give the instruction, defendant, Central Bank and Trust Company, trustee, excepted and assigned error.

The issues submitted to the jury and their answers thereto were as follows:

"1. Were plaintiffs induced to execute the notes described in the complaint by fraudulent representations of Laurel Park Estates, Inc.? Answer: Yes.

2. If so, what amount are plaintiffs entitled to recover from defendant, Laurel Park Estates, Inc.? Answer: $1,250 and interest.

3. Did the defendant, Central Bank and Trust Company, as trustee, acquire the notes described in the answer and counterclaim of said defendant before maturity and in good faith and for value without notice of any infirmity in the notes or defects in title of Laurel Park Estates, Inc.? Answer: No.

4. What amount, if any, are the plaintiffs indebted to defendant, Central Bank and Trust Company, as trustee? Answer: Nothing."

Other material evidence will be set forth in the opinion.

George M. Pritchard for plaintiff.

Bernard & Heazel for defendant, Central Bank and Trust Company, trustee.

CLARKSON, J. This is an action for rescission, the plaintiffs alleging actionable fraud.

The record discloses that none of the exceptions and assignments of error except those above set forth is in accordance with the rules of this Court. The exceptions to the charge should be made as pointed out in *Rawls v. Lupton,* 193 N. C., p. 428, at p. 432. It is there said: "Continuity of the charge is necessary with the 'specific' exceptions. Anything else is unfair to the trial judge—to have his charge cut up in piecemeal and disconnected."

The defendant, Laurel Park Estates, Inc., filed no answer to the complaint that set forth actionable fraud. Plaintiff, Mrs. Clark, purchased the lot in controversy for $5,000, paid one-fourth cash and gave three negotiable notes for the balance, $1,250 each, due 12, 18 and 24 months, to Laurel Park Estates, Inc., or order. The Central Bank and Trust Company, as trustee, set up the defense that "Said Laurel Park Estates, Inc., duly endorsed, transferred and delivered to the defendant, Central Bank and Trust Company, as trustee, for value, and before maturity, the said three notes and the said defendant, Central Bank and Trust Company, as trustee, is now the bona fide holder of said notes," and demanded judgment against the plaintiffs for the amount and interest.

The court below charged the jury, to which the Central Bank and Trust Company, trustee, excepted and assigned error: "The court instructs the jury that the defendant, Laurel Park Estates, Inc., not having answered, and from the evidence introduced, if the jury believe the same, under the definition of fraud and instructions later to be given, will answer the first issue Yes, and the second issue $1,250, and interest from the date of payment." This instruction says *"under the definition of fraud and instructions later to be given."*

In *Nichols v. Fibre Co.,* 190 N. C., at p. 6, it is said: "Defendant further assigns as error the failure of the court in the charge to the jury to comply with the requirements of C. S., 564. This statute makes it the duty of the judge presiding at a trial, in which issues are submitted to the jury, 'to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon.'" *Wilson v. Wilson,* 190 N. C., 819. There is no assignment of error, as in the *Nichols case,* that the court below did not comply with the requirements of C. S., 564.

If it be conceded that the Central Bank and Trust Company, trustee, could take advantage of this, if the exception to the charge was properly made, yet on this record from all the evidence we could not hold that this was reversible error. *Proctor v. Fertilizer Co.,* 189 N. C., 243.

"Fraud, it has been said, assumes so many different hues and forms that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily on the conscience and judgment of the court or jury in determining its presence or absence." 51 A. L. R., p. 47; *McNair v. Finance Co.,* 191 N. C., at p. 716.

The record discloses a charge of actionable fraud, so cunning, subtle and shrewd, that defendant, Laurel Park Estates, Inc., made no answer and allowed the action against it to go by default.

The evidence was plenary to establish the fraud as alleged practiced on unwary victims:

> "'Will you walk into my parlour,' said the spider to a fly;
> ''Tis the prettiest little parlour that ever you did spy.'"

The agents of the Laurel Park Estates, Inc., set the web—they brought plaintiffs from their home in Maryville, Tenn., took them to Kenilworth Inn and places of amusement and paid their expenses. Then took them to the top of Stradley Mountain, some eight miles from Asheville, N. C. A lecture was delivered by an agent, who said he had been *all over the world,* and this was the *most beautiful spot* he had ever seen for a development. Then he described what the development was to have. Hard-surfaced roads, paved streets and sidewalks, water, electric lights, telephones, sewers, golf course, clubhouse, schoolhouse, a business section, etc. A hotel at a cost of a million or two dollars under contract to be erected on top of the mountain by the first of the year, to be called "Lafayette Chateau," underground wiring for electric lights and telephone connections, lakes, parks and those things which make "a beautiful place." The water to be brought from Mount Pisgah watershed. That the money for these improvements was in the Central Bank and Trust Company in Asheville. They had a band concert and luncheon. From the office a megaphone was repeatedly saying "Sold." "It seemed as if they were selling lots fast." The agent guaranteed to refund to the purchasers or resell at a profit. Plaintiffs' evidence was to the effect that this was not complied with. The subtle tempter was there and the lady plaintiff, with her husband standing by "She took of the fruit thereof and did eat." The plat was ready. *"He had the red ink mark put on lot 7 on the plat."* It was near the imaginary Chateau. She *borrowed* the money to pay for the lot. She signed the notes and deed of trust and bought this property because of the agent's "alluring portrayal" of the *wonders* to be made there. Later she went back to the place, portrayed almost perhaps as beautiful as the Garden of Eden: "I went out there the other day to see if the improvements had been carried out. There is no paving there and it is just a waste place, grown up with scrubby pines. There are no telephone lines—*not anything in the world."* It turned out to be a "fool's paradise." It was in evidence that there was no money in the Central Bank and Trust Company for the purpose of making the improvements. All the above representations are more than merely "dealer's talk." The evidence is abundant to be submitted to the jury to show no intention of performance. It may be termed "futurity fraud."

In 1 Bigelow on Fraud, 484, it is said: "The general rule in regard to promises is that they are without the domain of the law unless they create a contract, breach of which gives to the injured party simply a right of action for damages and not a right to treat the other party as guilty of a fraud. But that proceeds upon the ground that to fail to perform a promise is no indication that there was fraud in the transaction. There may, however, have been fraud in it; and this fraud may have consisted in making a promise with intent not to perform it. To profess an intent to do or not to do, when the party intends the contrary, is as clear a case of misrepresentation and of fraud as could be made. A promise is a solemn affirmation of intention as a present fact." *Hill v. Gettys,* 135 N. C., at p. 376.

In *Braddy v. Elliott,* 146 N. C., 578, at p. 582, it is said: "If the jury should find, in addition to their findings on the first and second issues, that the defendant fraudulently induced plaintiffs to agree to the exchange by falsely representing and pretending that he would build two suitable dwellings and necessary outhouses on the tract of land, such finding would be ample basis for the decree canceling the entire transaction. . . . The subsequent acts and conduct of a party may be submitted to the jury as some evidence of his original intent and purpose, when they tend to indicate it."

In *Herndon v. Durham,* 161 N. C., p. 650, at p. 556, it is said: "A promise is usually without the domain of the law, unless it creates a contract, but if made when there is no intention of performance, and for the purpose of inducing action by another, it is fraudulent, and may be made the ground of relief." *Abel v. Dworsky,* 195 N. C., 867; *Palmetto Bank and Trust Co. v. Grimsley,* 134 S. C., 493, 51 A. L. R., 42.

Bispham's Equity (9 ed.), sec. 211, says: "The representation must not be an expression of intention merely. A man has no right to rely upon what another says he intends to do, unless, indeed, the expression of intention assumes such a shape that it amounts to a contract, when, of course, the party will be bound by his engagement and for the breach of which the other side has, ordinarily, an adequate remedy at law. But if a promise is made with no intent to perform it, and merely with a fraudulent design to induce action under an erroneous belief, or if a representation amounts to a statement of fact, although dependent upon future action, in either case there is ground for equitable relief." See *Walsh v. Hall,* 66 N. C., 233; *Furst v. Merritt,* 190 N. C., at p. 403; *McNair v. Finance Co., supra,* p. 716-7.

In *May v. Loomis,* 140 N. C., at p. 357, it is held: "In order to rescind, however, the party injured must act promptly and within a reasonable time after the discovery of the fraud, or after he should have discovered it by due diligence; and he is not allowed to rescind in part and affirm in part; he must do one or the other. And, as a general rule, a party is not allowed to rescind where he is not in a position to put the other in *statu quo* by restoring the consideration passed. Furthermore, if, after discovering the fraud, the injured party voluntarily does some act in recognition of the contract, his power to rescind is then at an end. These principles will be found in accord with the authorities. Bishop on Contracts, secs. 679, 688; Beach on Contracts, sec. 812; Page on Contracts, secs. 137, 139; Clark on Contracts, pp. 236, 237; *Trust Co. v. Auten,* 68 Ark., 299; *Parker v. Marquis,* 64 Mo., 38." *McNair v. Finance Co., supra,* at p. 718.

In 6 R. C. L., part sec. 316, at p. 934, it is said: "Fraud is not waived unless there is conduct inconsistent with a purpose to disaffirm the contract after full knowledge of the facts which constitute the fraud, and raise an election whether the defrauded party will go on with the contract, or disaffirm what has been done. But full knowledge of a fraud does not mean that the party defrauded shall have knowledge of all of the evidence tending to prove the fraud. If he has knowledge of the material facts which go to make up the case of deceit as practiced upon him, it is sufficient to make him elect whether he will go on with the contract, or stop short and sue for the loss he has already suffered. If a contract has been procured by fraud, and the person defrauded, with knowledge of the substance of the fraud, elects to affirm the contract, he cannot subsequently, upon discovering new incidents of the same fraud, elect to rescind the contract. Knowledge of the essence of the fraud puts him to his election." *Hawkins v. Carter, ante,* 538.

The evidence was to the effect that the interest payment was made before the discovery of the fraud and plaintiffs are in the position to put the parties in *statu quo.* They offered to reconvey and the judgment requires this to be done.

The next proposition: Did the court err in overruling motion of appellant, Central Bank and Trust Company, trustee, for a directed verdict on the third and fourth issues? We think not.

In *Bank v. Wester,* 188 N. C., at p. 375, it is said: "This matter is so well stated in *Moon v. Simpson,* 170 N. C., 336-7, by *Allen, J.,* that we reproduce it: 'In *Trust Co. v. Bank,* 167 N. C., 261, the Court said: "Our negotiable instrument law is simply the codification of the common law, and under both the statute and the common law the possession of a negotiable instrument by the endorsee, or by a transferee where endorsement is not necessary, imports prima facie that he is the lawful owner and that he acquired it before maturity, for value, in the usual course of business and without notice of any circumstances impeaching its validity. Nothing else appearing, this entitles the holder of a negotiable instrument to maintain an action upon it. By presenting the paper, in case duly endorsed, the plaintiff made out a prima facie case, that is, a case sufficient to justify a verdict for him on the first issue." This prima facie case may be rebutted. The rule is different where it is shown that the title of the person who *negotiated the instrument* is defective (Rev., sec. 2208 (C. S., 3040), and his title is defective if "he obtained the instrument or any signature thereto by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration as amounts to fraud." Rev., sec. 2204 (C. S., 3036). In such case, when it is shown that the title of the person who negotiated the instrument is defective, or there is evidence of the fact, "it is necessary for a recovery by one claiming to be the holder in due course to show by the greater weight of the evidence that he acquired the title (1) before maturity; (2) in good faith for value; (3) without notice of any infirmity or defect in the title of the person negotiating it." *Mfg. Co. v. Summers,* 143 N. C., 108; *Smathers v. Hotel Co.,* 168 N. C., 69; *Bank v. Fountain,* 148 N. C., 590; *Bank v. Branson,* 165 N. C., 344; *Bank v. Drug Co.,* 166 N. C., 100.'" *Holleman v. Trust Co.,* 185 N. C., 49; *Bank v. Felton,* 188 N. C., 384.

It may be noted that defendant in its defense does not allege that it "had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." The third issue was in conformity with the law and had this requisite.

C. S., 3033, is as follows: "A holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face; (2) that he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact; (3) that he took it for good faith and value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." *Bank v. Wester, supra.*

These are material facts to be proved by the Central Bank and Trust Company, trustee, by the greater weight of the evidence that it was a holder in due course, when under the facts as appear on the record in this case there was evidence to the effect that the notes were obtained by fraud. The Central Bank and Trust Company's, trustee, evidence was to the effect that it was a holder in due course for the bondholders. The plaintiff's evidence was to the contrary and to the effect that the Central Bank and Trust Company, trustee, did not take the notes in good faith and for value and without notice. What was the combination of facts and circumstances relied on by plaintiffs? (1) The three notes all had reference that each was one of a series secured by deed in trust on real estate bearing even date. (2) The release made by the Central Bank and Trust Company, as trustee, to Mrs. Clark, releasing lot in controversy. The release recites (a) a deed in trust from Stradley Mountains, Inc., dated 1 March, 1926, duly registered, to Central Bank and Trust Company, trustee, to secure certain indebtedness (b) on the same date a deed from Stradley Mountains, Inc., certain land including the lot in controversy to defendant Laurel Park Estates, Inc., duly registered, (c) on the same date deed in trust from Laurel Park Estates, Inc., to Central Bank and Trust Company, trustee, certain lands including the lot in controversy duly registered. (3) The trust deed made to Central Bank and Trust Company, trustee, contained certain provisions before a release could be made by it, among other things (a) which consideration may be cash (b) or partly cash and partly obligations secured by purchase-money mortgage or deed of trust to Central Bank and Trust Company, as trustee, upon the property so sold to be released. (4) The lot was eight miles from Asheville at the time released with no improvements on it. By the terms of the trust the bank was authorized to release lots therefrom upon being paid "50% of the purchase price of the property so sold, provided in no event should the amount paid for each release be less than a sum equal to $1,000 per acre." (5) The release from the bank to Mrs. Clark recites "in consideration of *a sum of money sufficient* under the terms of each of said deeds of trust to entitle the said party of the second part to a release of the land hereinafter described from the lien and effect of said deed of trust." (6) The attorney of the Laurel Park Estates, Inc., in writing to plaintiff, said: "If however you do not wish to forward the deed of trust and notes to me, mail the same to the Trust Department of the Central Bank and Trust Company, and sign the enclosed letter addressed to that officer, and the deed will be placed there for delivery to you upon receipt of the notes and deed of trust properly signed and executed." (7) John M. Clark also testified that C. W. Brown, the trust officer, told him that he "held them in trust for Laurel Park Estates, Inc., and Stradley Mountain Development Corporation." (8) The Central Bank and Trust Company, trustee, knew by the deed of trust to it, or in the exercise of due care ought to have known, that the development was eight miles from Asheville, on Stradley Mountain. It knew, or in the exercise of due care ought to have known, that these lots with no improvements on them were selling at fabulous prices.

Plaintiff's evidence was to the effect that the lot was released for "a *sum of money sufficient* under the terms of each of said deeds of trust." The trust deed made by the Laurel Park Estates, Inc., to the Central Bank and Trust Company, as trustee, contained a provision authorizing a release *for cash.* The evidence would indicate that the release was for cash, not for notes, and the Central Bank and Trust Company, trustee, for the bondholders, obtained a sum of money sufficient for the release and paid nothing of value for the notes—$3,750. One thousand dollars of the $1,250 cash payment could be inferred was paid it under the trust deeds for the bondholders, the minimum release for an acre being $1,000, and plaintiff purchased only one lot, No. 7, on the plat.

The president of the Laurel Park Estates, Inc., and its attorney and other officers were also directors of Stradley Mountain Development Corporation, and the president of Laurel Park Estates, Inc., its vice-president. The evidence would indicate that the Central Bank and Trust Company, as trustee, held the notes in trust for the Laurel Park Estates, Inc.

John M. Clark testified that C. W. Brown, the trust officer, told him that he held the notes in trust for Laurel Park Estates, Inc., and Stradley Mountain Development Corporation. If this was true, the Central Bank and Trust Company, as trustee, could not hold the notes for the bondholders. All this was evidence to contradict the testimony of certain officers of the Central Bank and Trust Company, that the notes were held in trust by it for the bondholders. The probative force was for the jury.

In regard to the duty of a prudent man to make inquiry, see *Mills v. Kemp, ante,* at p. 314.

The law in regard to negotiable instruments is so well stated by *Hoke, J.,* in *Bank v. Fountain,* 148 N. C., at p. 594-5, that we repeat it: "It may be that when fraud is established in procuring the instrument, or there was evidence offered tending to establish it, if the plaintiff, as he is then required to do, should lay before the jury all the evidence available as to the transaction, and it should thereby appear, with no evidence to the contrary and no other fair or reasonable inference permissible, that plaintiff was the purchaser of the instrument in good faith, for value, before maturity and without notice, the court could properly charge the jury if they 'believed the evidence,' or if they 'found the facts to be as testified'—a more approved form of expression—they would render a verdict for plaintiff. But here, the fraud having been established or having been alleged, and evidence offered to sustain it, the circumstances and bona fides of plaintiff's purchase were the material questions in controversy; and both the issues and the credibility of the evidence offered tending to establish the position of either party in reference to it was for the jury and not for the court. *S. v. Hill,* 141 N. C., 771; *S. v. Riley,* 113 N. C., 651. As said by the Court in this last case, the 'plea of not guilty disputes the credibility of the evidence, even when uncontradicted.' His Honor below, therefore, had no right to say to the jury, on this very material question, 'The prima facie case of plaintiff having been restored by the uncontradicted evidence of the president of the bank, that it acquired the note in the usual course of business, before maturity and without notice of any vice in it'; for this assumes that the statement of the president is to be taken as true, and withdraws that matter from the jury." In the above case the Court further said: "The trial court was probably misled by the language of the opinion in *Bank v. Burgwyn,* 110 N. C., 273, making a quotation from Daniel on Negotiable Instruments, sec. 819, without adverting to the facts stated in the case on appeal, and it is in reference to such facts that a decision is to be considered authority, from which it appears that the trial court in that case had submitted the question of the bona fides of plaintiff's purchase to the jury, and had not undertaken to determine it, as was done in the present case. The statement of law contained in this section of Mr. Daniel's valuable work on Negotiable Instruments, sec. 819, has been subjected to adverse comment in the decisions on the subject, which we have adopted as law by our statute, and there is doubt if, since the enactment of this statute, it can be regarded as correctly expressing the rule for trial of causes affected by this section of the statute in reference to the burden of proof." The principle set forth in *Bank v. Fountain, supra,* has been reiterated time and time again by this Court.

Notwithstanding the fact that the exceptions and assignments of error are not in accordance with the rules of this Court, we can find no error in the charge taken as a whole. We find in the judgment of the court below

No error.

BOARD OF HEALTH OF BUNCOMBE COUNTY, THE CITY OF ASHEVILLE ET AL. v. R. J. LEWIS AND LEWIS MEMORIAL PARK COMPANY.

(Filed 13 February, 1929.)

1. **Appeal and Error—Review—Findings of Fact—Injunctions.**

The Supreme Court on appeal is not concluded by the findings of fact of the lower court in refusing to continue a temporary injunction to the final hearing, but when the order appealed from is based on findings of fact supported by sufficient evidence they will be deemed prima facie correct.

2. **Cemeteries—Control and Regulation—Injunctions—Health.**

Upon findings of fact supported by sufficient evidence that a cemetery was not on the watershed of a city, and that the stream draining the cemetery was already unfit for domestic use, and that the cemetery would not contaminate the stream nor pollute the wells or springs on nearby lands, nor injure the health of the citizens of the city or the residents of the area drained by the stream, and that the resolution of the county board of health in prohibiting the use of the cemetery was unconstitutional and void for the purpose of passing upon the question: *Held,* the dissolving of the temporary injunction restraining the further burial of dead bodies in the cemetery was not erroneous upon the hearing of a notice to show cause why the temporary order should not be continued to the final hearing.

3. **Same—Nuisance.**

Whether the maintenance of a cemetery is a menace to the public health and subject to abatement as a nuisance depends upon the position and extent of the burial grounds and especially upon the manner in which the burials are effected, and a cemetery will not be regarded in law as a nuisance *per se.*

4. **Same—County Board of Health—Ordinances.**

The finding of the county board of health that the maintenance of a cemetery upon the watershed is a nuisance to the public health has not the same force as the positive declarations of statute, and it may be shown in answer to a notice to show cause why an injunction should not be continued to the final hearing that the particular cemetery, as maintained, was not a nuisance entitling the plaintiff to injunctive relief. C. S., 7065.

APPEAL by plaintiffs from *McElroy, J.,* at August Term, 1928, of BUNCOMBE. Affirmed.

Action for permanent injunction, enjoining and restraining defendants from burying human bodies in or upon any portion of a tract of land, situate in Buncombe County, and from establishing and maintaining on said land a cemetery or burial ground for such purpose, and for other relief.

Plaintiffs allege that such use of said land will create a public nuisance, causing them special damage, and that the same will be in violation of an ordinance duly adopted by the Board of Health of Buncombe County, under authority conferred upon said board by the General Assembly of North Carolina. The issues arising upon the pleadings have not been tried, nor has a final judgment been rendered in the action.

At a hearing on 18 August, 1928, pursuant to notice to defendants to show cause why a temporary restraining order theretofore issued should not be continued to the final hearing, an order was made, on motion of defendants, upon facts found by the judge, dissolving, setting aside and vacating said restraining order.

From this order plaintiffs appealed to the Supreme Court.

Mark W. Brown, Weaver & Patla, Sale & Pennell and J. E. Swain for plaintiffs.

Anderson & Howell and Jones & Jones for defendants.

CONNOR, J. During the spring of 1927, defendant, R. J. Lewis, purchased a tract of land situate in Buncombe County, containing fifteen acres, more or less, and located in Beaverdam Valley. The said R. J. Lewis is a resident of the city of Asheville, where he is engaged in business as an undertaker. He is the owner of the "Lewis Funeral Home," which he conducts in the city of Asheville in connection with his business as an undertaker.

During February, 1928, the said R. J. Lewis conveyed the said tract of land to his codefendant, Lewis Memorial Park Company, a corporation organized under the laws of the State of North Carolina. The said corporation is authorized to establish and maintain a cemetery or burial ground for dead bodies. The said R. J. Lewis is the principal stockholder of said corporation.

The tract of land now owned by the defendant, Lewis Memorial Park Company, has been graded, laid off into lots, and otherwise prepared for use as a cemetery or burial ground. Three human bodies have been buried in said cemetery, and defendants propose from time to time to bury other bodies therein. The said cemetery has been established and will be maintained and operated by defendants as a business, with a view to making a profit on their investment. Defendants have invested in the purchase of said land, and in making improvements thereon, approximately the sum of $34,000.

The said land is located on the watershed of Beaverdam Creek, which flows through Beaverdam Valley. The area of said watershed is from fourteen to sixteen square miles.

On 16 May, 1928, the plaintiff, Board of Health of Buncombe County, adopted an ordinance in words as follows:

"Whereas, it appears to the undersigned county board of health that the community north of the city of Asheville in said county, commonly known as the 'Beaverdam Valley,' through which flows the Beaverdam Creek and its tributaries, has now become a populous area; and

Whereas, the waters of Beaverdam Creek have heretofore been used to supplement the water supply of the city of Asheville, and is now available for said use; and,

Whereas, some inhabitants of the Beaverdam Valley are using the waters of said Beaverdam Creek for domestic purposes; and,

Whereas, the board, after careful investigation, is of the opinion that the waters of said creek are now being contaminated by the maintenance of cemeteries or burial grounds, in which human bodies are buried, which said contamination this board finds as a fact to be dangerous to public health:

Now, therefore, be it ordained by the county board of health of the county and State aforesaid, pursuant to the power and authority contained in chapter 118 of the Consolidated Statutes of North Carolina, and amendments thereto, that any person, firm or corporation, burying or causing to be buried any human body in any of the lands forming the watershed of the Beaverdam Creek or any of its tributaries, shall be guilty of a misdemeanor, and fined not exceeding fifty dollars ($50), or imprisoned not exceeding thirty (30) days.

That this rule and regulation is in the judgment of this board necessary to protect and advance the public health, and shall be in full force and effect from date hereof."

This action was begun on 27 July, 1928. The plaintiffs are (1) the Board of Health of Buncombe County, charged by statute with the duty of making such rules and regulations as in their judgment may be necessary to protect and advance the public health; (2) the city of Asheville, a municipal corporation, authorized by its charter to supply water to its citizens and to others, for drinking and domestic purposes, by means of a public water system, and (3) residents of Beaverdam Valley who maintain homes therein, and use for drinking and domestic purposes water from springs situate near the land owned by defendants.

In their complaint plaintiffs allege "that the waters from the Beaverdam Creek and its tributaries impounded in the lake, known as Beaver Lake, have heretofore been used by the city of Asheville as an emergency supply of water for the city of Asheville in supplying its citizens; and as the plaintiffs are advised, informed and believe is available to the city of Asheville and its citizens at any time in the future when the same may be needed to supplement the supply of the city of Asheville in case of drought, bursting of lines or reservoirs or for any other emergency, and that certain of the individual plaintiffs herein have springs located upon their lands at their homes in Beaverdam Valley from which the waters thereof are used for drinking and all other domestic purposes; and the other individual plaintiffs are users along with the other citizens of Asheville and Beaverdam Valley of the city's water supply for drinking and all other purposes."

The other material allegations of the complaint are as follows:

"10. That these plaintiffs are advised, informed and believe that the defendants, R. J. Lewis, undertaker, and Violet Hill Memorial Park Company, Inc. (now Lewis Memorial Park Company), in utter disregard of the rules, regulations and ordinances passed by the said county board of health as aforesaid, for the protection of the health and welfare of the citizens of Beaverdam Valley and Buncombe County, and in complete contempt for the authority of the said county board of health, and in utter disregard of the rights of the plaintiffs and other citizens of said county, have already buried one or more human bodies upon said lands in violation of the law; and unless restrained, plaintiffs verily believe they will, at a very early date inter and bury a large number of human bodies upon said lands in violation of the ordinances, rules and regulations passed for the welfare of said community and to the great injury of the plaintiffs in this case and the public in general.

"11. That the plaintiffs are advised, believe and so aver that the burial of said dead human bodies upon said lands as contemplated, threatened and proposed by the said defendants, will create a public nuisance and on account of the odors, seepage and other deleterious and injurious odors, vapors and drainage arising from and seeping out from decaying human flesh will greatly jeopardize the lives and well being of the plaintiffs in this case and the citizens of said section of Buncombe County and all who use the waters from Beaver Lake or from springs in the vicinity of said section."

Answering the foregoing allegations, defendants admit that they have buried three human bodies in the cemetery which they have established on their tract of land described in the complaint, and that they intend to bury other bodies therein; they deny, however, that the burying of said bodies in said land has caused or will cause injury to the plaintiffs or to others, or has endangered or will endanger the public health. They allege that the ordinance adopted by the board of health of Buncombe County, forbidding the burial of human bodies in any of the lands forming the watershed of Beaverdam Creek or any of its tributaries, is void, for that: first, the said board of health is without power to adopt said ordinance; and, second, that said ordinance is unreasonable and arbitrary.

Pending the trial of the issues arising on the pleadings in this action, a restraining order was issued on 27 July, 1928, temporarily restraining and enjoining defendants from burying in or upon the land described in the complaint human bodies contrary to the order, regulation and ordinance of the board of health of Buncombe County, adopted on 16 May, 1928. Upon the hearing, pursuant to notice to defendants to show cause why said temporary restraining order should not be continued to the final hearing, the court found the facts pertinent to the order to be made by it, with respect to said matter, as follows:

"1. That Beaver Lake and Beaverdam Creek are not part of the Asheville public water supply, and do not belong to the Asheville waterworks.

2. That the waters in Beaverdam Creek and Beaver Lake are unfit for drinking purposes, and are polluted and contaminated, and are unfit for consumption as part of the Asheville water supply, or for any other domestic purpose.

3. That cemeteries have been operated and conducted on Beaverdam Creek, and bodies of human beings have been buried in cemeteries located on said Beaverdam Creek for one hundred and twenty (120) years.

4. That the waters of Beaverdam Creek and Beaver Lake have not been contaminated as a result of the burial of dead human bodies in cemeteries located on Beaverdam Creek, and that the burial of dead human bodies in the cemetery of the defendants located on the east side of Beaverdam Creek in Beaverdam Valley will not pollute the waters of the wells, springs, Beaverdam Creek or Beaver Lake.

5. That the health of the complainants and the residents of the Beaverdam Valley will not be injured by the operation of the cemetery of the defendants.

6. That the Beaverdam watershed is from eight to nine miles in length, and an average width of about two miles, and contains from fourteen to sixteen square miles.

7. That the resolution or rule of the board of health of Buncombe County, issued on 16 May, A.D. 1928, prohibiting the burial of human bodies in Beaverdam watershed, is unreasonable, unconstitutional and void."

Upon the foregoing facts it was "ordered, adjudged and decreed, that the temporary injunction and restraining order heretofore issued in the above-entitled action be dissolved, set aside and vacated."

The ultimate relief sought by plaintiffs in this action is (1) the recovery of damages for injuries caused plaintiffs by the burial of human bodies in and on defendants' land; (2) the abatement of the nuisance created by the burial of human bodies on defendants' land, by the removal of said bodies therefrom, and (3) a permanent injunction, enjoining and restraining defendants perpetually from maintaining a cemetery on said land, and burying human bodies therein. In support of their prayer for such relief, plaintiffs allege: first, that defendants have created, by the burial of bodies on said land, a public nuisance, which has caused special damages to plaintiffs, and that unless enjoined and restrained by the court, defendants will maintain said nuisance to plaintiffs' great damage; and, second, that defendants, by their violation of an ordinance adopted by the board of health of Buncombe County, have caused and by their continued violation of said ordinance will continue to cause great injury to plaintiffs.

Pending the final hearing of the action, plaintiffs contend that they are entitled to a continuance of the temporary restraining order heretofore issued, to said final hearing. Whether or not, upon the final hearing, plaintiffs will be entitled to the ultimate relief which they seek in this action, is not now presented for decision. The only question presented by this appeal is whether or not there was error in the order dissolving, setting aside and vacating the temporary restraining order, upon the facts found by the court.

The facts found by the judge from the affidavits offered as evidence upon the hearing of defendants' motion that the temporary restraining order be dissolved, are not conclusive upon plaintiffs' appeal to this Court. His findings of fact are, however, presumed to be correct, and as they are supported by the evidence, they will not be disturbed. *Lineberger v. Cotton Mills, ante,* 506; *Wentz v. Land Co.,* 193 N. C., 32, 135 S. E., 480; *Cameron v. Highway Commission,* 188 N. C., 84, 123 S. E., 465; *Sanders v. Ins. Co.,* 183 N. C., 68, 110 S. E., 597.

Plaintiffs' assignments of error based upon their exceptions to the several findings of fact, other than the finding that the ordinance adopted by the board of health is unreasonable, unconstitutional and void, cannot upon any phase of the case be sustained. These findings of fact are sufficient to support the order dissolving the temporary restraining order, at least insofar as said order enjoined and restrained defendants from maintaining a cemetery on their land, upon the allegation that same was a public nuisance, causing special damage to plaintiff. The finding of fact with respect to the validity of the ordinance adopted by the board of health of Buncombe County, is not material on the question as to whether the burial of human bodies in defendants' land, and the maintenance of a cemetery or burial ground thereon, will constitute a nuisance, resulting in damage to the plaintiffs. The findings of fact set out in the judgment, other than the fact that said ordinance is unreasonable, unconstitutional and void, are sufficient to support the order dissolving, setting aside and vacating the temporary restraining order. The judge, in effect, found, for the purposes of defendants' motion, upon this phase of the case, that the burial of dead bodies in defendants' land, and the maintenance of a cemetery thereon by defendants will not constitute a nuisance, as alleged by plaintiffs.

It has been generally held in this and in other jurisdictions that a cemetery, in which the dead have been or will be buried, is not a nuisance *per se.* In *Ellison v. Commissioners,* 58 N. C., 57, this Court reversed the order of the court below, refusing to dissolve an injunction, enjoining and restraining the defendants from maintaining a public cemetery on land adjoining the lands of the plaintiff, and making said injunction perpetual. *Manly, J.,* writing the opinion for the Court, says: "A consideration of the subject-matter of this complaint, as disclosed by the pleadings, leads us to the conclusion that a place of interment of the dead is not necessarily a nuisance, but that this must depend upon the position and extent of the grounds, and especially upon the manner in which the burials are effected. The dead must be disposed of in some way, and burial in the earth, suggested by the received revelation of man's origin and destiny, is that most generally resorted to." In *Clark v. Lawrence,* 59 N. C., 83, a bill was filed to obtain an injunction to restrain the defendant, who was the trustee of a Baptist congregation in the town of Greenville, from permitting the churchyard to be used as a cemetery. The cause was transferred by consent, under the practice then obtaining, from the court of equity of Pitt County to this Court. Upon consideration of the pleadings, exhibits and proofs, it was ordered that an issue be tried in the Superior Court of Law for Pitt County, to determine "whether the burial of the dead in the church lot mentioned in the pleadings has produced, or, if continued, is likely to produce, sickness in the plaintiff's family, or to impair their comfort, either by corrupting the air or the water in his wells." *Battle, J.,* says:

"Whenever, then, it can be clearly proved that a place of sepulture is so situated that the burial of the dead there will endanger life or health, either by corrupting the surrounding atmosphere, or the water of wells or springs, the court will grant its injunctive relief upon the ground that the act will be a nuisance of a kind likely to produce irreparable mischief, and one which cannot be adequately redressed by an action at law."

While, therefore, a cemetery in which the dead have been and will be buried, is not a nuisance *per se,* it may be shown that a particular cemetery, by reason of facts and circumstances affecting it, is a nuisance, and upon such showing, an injunction will be decreed, permanently enjoining and restraining the burial of dead bodies in such cemetery. In an action for such injunction, upon the finding by the judge that the cemetery or burial ground is and will continue to be a nuisance, a temporary restraining order will be issued, and after a hearing upon due notice to defendants, the order will be continued to the final hearing, when issues arising upon the pleadings involving the question as to whether the cemetery is a nuisance will be tried and determined. In the instant case, the judge having found for the purposes of the hearing that the cemetery in which defendants have buried dead bodies, is not a nuisance, and will not constitute a nuisance, if such bodies shall be buried therein, there was no error in dissolving the temporary restraining order for that reason.

Plaintiffs contend, however, that the findings of fact made by the board of health of Buncombe County, as the ground for the adoption of the ordinance, recited therein, are conclusive, and that therefore it was error for the judge to hear and consider affidavits offered by defendants to the contrary. This contention is presented more particularly by the assignment of error based on the exception to the finding that the ordinance is unreasonable, unconstitutional and void.

The principle that a statute enacted by the General Assembly, in the exercise of the police power of the State, to protect the public health, cannot be challenged by an allegation that the use of private property prohibited by the statute does not in fact endanger the health of the public, is not decisive of this contention. In *Board of Health v. Commissioners,* 173 N. C., 250, 91 S. E., 1019, it is said that "the conservation and protection of the public water supply are peculiarly within the police power of the State, referred very largely to the legislative discretion, entirely so with us, unless it clearly offends against some constitutional principle, and the Legislature, in the exercise of such powers, having forbidden the use of such stream for the purpose and in the manner described, its decision on the facts presented must be accepted as final, and defendants required to conform to the requirements of the law."

There is manifestly, we think, a distinction between a statute enacted by the General Assembly, and a rule, regulation or ordinance made or adopted by a county board of health, under statutory authority. The General Assembly has the power and authority to enact statutes, subject only to constitutional limitations; whereas a board of health has only such power to make rules and regulations and to adopt ordinances as has been conferred upon it by statute. A county board of health, in this State, has the immediate care of and responsibility for the health interests of the county. It has the power to make such rules and regulations as are in its judgment necessary to protect and advance the public health. C. S., 7065. When the validity of a rule or regulation made by a board of health is challenged upon the ground that the facts found by the board as justification for the same are not true, the finding is not necessarily conclusive. One whose rights of person or of property are injuriously affected by the rule or regulation will be heard by the courts upon his allegation that the facts are otherwise than as found by the board. As said in *S. v. Higgs,* 126 N. C., 1014, 35 S. E., 473, if a thing is not in fact a nuisance, calling it a nuisance does not make it so. To hold otherwise might result in the deprivation of rights of person or property without due process of law. 12 R. C. L., 1281.

It was not error for the judge in the instant case to hear and consider evidence offered by defendants in support of their contention that the facts did not justify the adoption of the ordinance by the board of health of Buncombe County. Nor was it error to find from the evidence offered at the hearing, for the purpose only of passing on defendants' motion, that the ordinance was unreasonable and therefore void. The order dissolving the temporary restraining order is

Affirmed.

IN RE WILL OF McD. BERGERON.

(Filed 20 February, 1929.)

1. **Trial—Instructions—Province of Court and Jury in General.**

   It is the duty of the court to state in a plain and correct manner the evidence given in the case and to explain the law arising thereon, and it is the province of the jury to ascertain the facts from the evidence, the weight and credibility thereof being exclusively for its determination. C. S., 564.

2. **Same—Expression of Opinion—Wills—Testamentary Capacity.**

   Where the charge of the court below on the issue of testamentary capacity, read from the text-book, is that where the testator's sickness is wholly physical, proof of his condition as to lethargy, unconsciousness, etc., "is entitled to little consideration," and that the courts will "scrutinize efforts by witnesses to infer mental weakness or insanity from mere physical decrepitude," and that "the will of an aged person should be regarded with great tenderness" when not procured by fraud, etc., is held as reversible error as an expression by the court on the weight and credibility of the evidence, C. S., 564, and a new trial will be awarded on appeal.

APPEAL by caveator from *Small, J.,* and a jury, at July Term, 1928, of GATES. New trial.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the deceased, McD. Bergeron, of sound and disposing mind and memory at the time of the execution of the paper-writing offered for probate? Answer: Yes.

2. Was the paper-writing offered for probate procured to be executed by undue influence, as alleged? Answer: Yes.

3. Is the paper-writing offered for probate and every part thereof, the last will and testament of the said deceased? Answer (by consent): Yes."

Upon the coming in of the verdict, the second issue appearing in the record was set aside by the judge as a matter of law on the ground of want of evidence to support the same.

The judgment of the court below, in part, is as follows: "Upon the verdict of the jury upon the issue as to mental capacity in favor of propounders as appears in the record, it having been heretofore consented that the court should answer the third issue upon the basis of the jury's verdict, and the court having answered said issue that the paper-writing offered in evidence and every part thereof is the last will and testament of the said McD. Bergeron, 'Yes,' it is further ordered, decreed and adjudged that the said paper-writing be and the same is hereby declared to be the last will and testament of the said McD. Bergeron, and is hereby admitted to probate in solemn form. The motion of caveator to set aside the verdict on the first, or mental capacity issue, is denied."

The other material facts and assignments of errors will be set forth in the opinion.

A. P. Godwin, Ward & Grimes and J. M. Glenn for caveator.
Costen & Costen and Ehringhaus & Hall for propounders.

CLARKSON, J. Briefly, some of the evidence bearing on the issues:

The alleged will of McD. Bergeron was signed by him on Friday evening, 10 December, 1926, about dark, a light was in the room. He was sitting up in bed propped up against the bedstead in his room, where he lived alone, above his store at the time he signed the alleged will. It was prepared from a memoranda made by one C. G. Ellis, who had an attorney prepare the alleged will, who brought it to Bergeron's room prior to his signing. It took the attorney about thirty-five minutes to write the will, which was done immediately after Ellis handed the attorney the memoranda that evening, and then taken to Bergeron's room by the attorney. John G. Cross was there at the time. It was read to Bergeron and he said it was what he wanted, and the attorney said he and the other witness, John G. Cross, signed it at Bergeron's request. John G. Cross testified that Ellis came down and met him on the street and told him Bergeron wanted him to go up and witness his will. That Ellis was the man that asked him to sign Bergeron's will. Besides the attorney and Cross, the witnesses to the alleged will, the only other person in the room was Ellis, the executor named in the will.

J. L. Hofler testified: "Friday about dark (about the time the alleged will was signed), Mr. Ellis came to me and said Mr. Bergeron wanted to know if I would hold up to my original offer of 65 per cent (on his stock of goods). It took me by surprise. As a result of that conversation, I saw Mr. Bergeron and bought the goods that same night. Friday night we immediately began taking inventory. I did not confer with Mr. Bergeron before taking inventory. I made the deal through Mr. Ellis." The check was given Mr. Ellis.

Bergeron was about 58 years old and had been sick a good deal that fall and had been away for his health. There was marked evidence of a decline in health and he was "bad off" in September. He had swelling in his feet and ankles and had a leaking heart. On the morning of 9 December, about 9 o'clock, it was discovered that Bergeron was ill in his room, the door was broken open and he was found lying with one foot off the bed in an unconscious condition. It was in evidence, on the part of the caveator, that on that day he was too low to talk. Late in the evening next day, about the time the paper-writing was signed, he was in pretty bad shape. At that time he was in such a condition that he did not have mind enough to know his different relatives and his relation to them and the scope and effect of making a will of the property he had. He didn't look like he had mind for anything. A witness, H. C. Rountree, testified as to his condition late in the afternoon of the 10th, about the time the alleged will was signed: "I didn't talk to him, but he looked to me like he was a dead man. I would just go and see him and wouldn't try to talk to him in the condition he was in. The impression his condition made on me with respect to his life, was that when I would go there he would be lying there like somebody dead all the times I saw him. I have seen him propped up in bed and one time I asked him how he was feeling and he said he didn't know. . . . As to my having had enough opportunity to have an opinion satisfactory to myself as to whether he had mind enough to know what he was doing, I don't think he had any at all."

John Baines testified: "His condition Friday night was bad (at the time the alleged will was signed). He didn't talk to me. He may have talked to others. I just stood and looked at him a minute or two and went back. He was always sleeping, or looked like it when I went up there, but you could speak to him and he would open his eyes and go right back again. That was as late as Friday night."

There was evidence, on the part of propounders that Bergeron had mental capacity to make a valid will, and there was no undue influence exerted.

On Tuesday, 21 December, Bergeron was taken to his nephew's home in Pitt County, and died there on the night of the 22d—twelve days after the alleged will was made.

McD. Bergeron was married on 31 January, 1900, to Mary Shaw, in Washington, N. C., and lived with her about two years. There was born of the marriage one child on 15 November, 1900. She is some 28 years old, is married and is the caveator in this proceeding—Mary E. Hudgins. Mary Bergeron brought an action and obtained a divorce against McD. Bergeron on the grounds of abandonment and nonsupport. She took the child and raised her. She lived in Washington, N. C., Norfolk, Va., and now lives with her daughter and her husband in New Jersey. McD. Bergeron, the father, contributed nothing to the child's support after the separation, but the entire burden was on the mother. The alleged will of McD. Bergeron left his property to his niece and nephews.

The court below set aside the findings of the jury on the second issue on the ground of insufficient evidence, as a matter of law, and gave judgment for the propounders.

In *Lumber Co. v. Branch,* 158 N. C., at p. 253, the law is thus stated: "It is settled beyond controversy that it is entirely discretionary with the court, Superior or Supreme, whether it will grant a partial new trial. It will generally do so when the error, or reason for the new trial, is confined to one issue, which is entirely separable from the others, and it is perfectly clear that there is no danger of complication. *Benton v. Collins,* 125 N. C., 83; *Rowe v. Lumber Co.,* 133 N. C., 433." *Whedbee v. Ruffin,* 191 N. C., at p. 259.

The court having submitted the issues appearing above, charged the jury thereon and stated the contentions of the parties, to which there was no exception, except to that part of the charge in which the court read the following from 28 R. C. L., sec. 44, page 94, concerning old age and disease in the making of a will, to wit: "Mere old age, physical weakness and infirmity or disease, or even extreme distress and debility of the body are not necessarily inconsistent with testamentary capacity, but such facts are admissible in evidence to aid the jury in determining whether or not the testator had sufficient capacity at the time of making his will. The circumstance that a testator at the time of executing his will is suffering from acute pain or is on his death bed does not take away his testamentary capacity (of itself). A person who is blind may make a will as may one who is deaf and dumb. *Where a testator's sickness is wholly physical, proof of his condition as to lethargy, suffering or unconsciousness on days preceding or following the execution of a will is entitled to very little consideration. The powers of the mind may be weakened and impaired by old age and bodily disease without destroying the testamentary capacity and mere mental weakness not due to mental disease, but solely to physical infirmity does not constitute mental unsoundness, and the courts will scrutinize efforts by witnesses to infer mental weakness or insanity from mere physical decrepitude.* It has been said however that weakness of intellect sufficient to negative such capacity may be traceable to old age, disease and bodily infirmity. To an aged person as well as one in the prime of life the usual test as to testamentary capacity will be applied, as for example, whether the testator knows the amount of his property and the natural objects of his bounty, and understands what he is doing (when he disposes of his property and makes his will). The law prescribed no limit in point of age beyond which a person cannot dispose of his property by will. (Nobody in North Carolina can make a will unless twenty-one years of age.) *On the contrary it has been justly said that the will of an aged person should be regarded with great tenderness when it appears not to have been procured by fraudulent means, but contains those very dispositions which the circumstance of his situation and the course of natural affections dictated."*

The caveator excepted and assigned error to the above part of the charge in italics.

We have a statute which has been in force in this State since 1796, as follows: "C. S., 564. No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon."

There are expressions in the charge which we cannot sustain: (a) "Where a testator's sickness is wholly physical, proof of his condition as to lethargy, suffering and unconsciousness on days preceding or following the execution of a will *is entitled to very little consideration."* The weight and consideration was for the jury and not the court to determine. (b) "And the *courts will scrutinize efforts by witnesses to* *infer mental weakness or insanity* from mere physical decrepitude. On the contrary it has been justly said that *the will of an aged person should be regarded with great tenderness* when it appears not to have been procured by fraudulent means, but contains those very dispositions which the circumstances of his situation and the course of natural affections dictate." In this jurisdiction, the jury find the facts in issue, upon the weight of the evidence, as the case may be, not on tenderness or great tenderness, nor on passion, prejudice or sympathy. The oath of the jurors: "And true verdicts give according to the evidence, so help you God." It was for the jury, and not the court, to scrutinize efforts by witnesses to infer mental weakness or insanity from mere physical decrepitude.

From the evidence adduced on the part of the caveator, and from the facts and circumstances of the case, the portions of the charge objected to, on the whole, were prejudicial and reversible error. They impinged the above statute that no judge "shall give an opinion whether a fact is fully or sufficiently proven." In this jurisdiction, the court interprets the law and the jury ascertains the facts—the wall between the two is impenetrable. *S. v. Sullivan,* 193 N. C., 754. See annotations under C. S., 564, N. C. Code 1927, Michie. It is not so in all jurisdictions. The questions of mental capacity and undue influence in making wills have recently been fully discussed by this Court. See *In re Will of Creecy,* 190 N. C., 301; *In re Will of Brown,* 194 N. C., 583; *In re Will of Efird,* 195 N. C., 76. For the reasons stated there must be a

New trial.

MOLLIE REBECCA WOOTEN v. L. R. BELL.

(Filed 20 February, 1929.)

1. **Bills and Notes—Actions—Burden of Proof.**

   Upon the admission of the execution of a note the burden is upon the defendant to prove payment when relied on by him.

2. **Bills and Notes—Actions—Lost or Destroyed Notes.**

   A recovery may be had upon a lost or destroyed note upon satisfactory evidence of its execution, and where this is proved, testimony as to the note itself is admissible.

3. **Same—Payment—Bonds.**

   The provisions of C. S., 3055, that upon payment of a note it must be delivered up to the party paying it, does not apply where the note has been lost or destroyed, and, under the facts of this case, there was no error in not requiring a bond for the protection of the maker where there was no request made therefor.

4. Forfeitures—Failing to List Evidence of Indebtedness for Taxes—Bills and Notes.

Public Laws of 1927, ch. 71, sec. 64, providing that notes, claims, etc., shall not be recoverable in any action or suit until they have been listed and the taxes paid thereon, will not be construed to work a forfeiture, and does not prevent a recovery on such evidence of debt, but postpones the recovery of judgment thereon until listed and the taxes paid, and where in an action on a note this defense is pleaded, the trial court has the power to allow the plaintiff to list it and pay taxes thereon during the trial and give judgment.

APPEAL by defendant from *Barnhill, J.*, and a jury, at November Term, 1928, of EDGECOMBE. No error.

The issues submitted to the jury and their answers thereto were as follows:

"1. Has the note set out and described in the complaint, from the defendant to the plaintiff been paid, as alleged? Answer: No.

2. If not, what amount is due thereon? Answer: $750 and interest.

3. Has the plaintiff failed to list for taxation said note as a solvent credit during the several years since the same was given to the plaintiff, with a view to evade the payment of taxes? Answer: Yes."

The court below rendered the following judgment: "This cause coming on to be heard at this, the November Term, 1928, of the Superior Court of Edgecombe County, and being heard before his Honor, M. V. Barnhill, judge presiding, and a jury, and the jury having answered the issues as set out in the record: And, whereas, during the course of the trial the defendant by amendment to his pleadings having raised the issue that the note sued on in this action had not been listed for taxes, and the jury having answered this issue in favor of the defendant, and before judgment, the plaintiff having listed and paid all taxes and penalties due on said note, and the court finding this as a fact, that said note has now been listed, and all taxes and penalties paid thereon: It is, therefore, on motion of Henry C. Bourne, attorney for the plaintiff, ordered, adjudged and decreed that said plaintiff recover judgment against said defendant for the sum of $750, with interest thereon at the rate of 6% per annum, from 1 January, 1921, until paid, and for costs of this action to be taxed by the clerk."

The material facts and assignments of error will be set forth in the opinion.

Henry C. Bourne for plaintiff.
F. M. Wooten for defendant.

CLARKSON, J. The plaintiff sued defendant for the recovery of $750, and interest due by note made by defendant to her. The defendant admitted the execution of the note and plead payment. The defendant set up the further defense, "That plaintiff with a view to evade payment of taxes failed to cause to be listed for taxation the note in question and pay taxes thereon. (This amendment allowed and made in progress of the trial.)

The defendant's first exception and assignment of error was to the effect that the Court erred in permitting the witness, A. T. Wooten, to give evidence relative to the note, the subject of the action. The defendant demanded that the plaintiff produce the note on which the action was based. The defendant contended that the note had been paid, delivered to him and destroyed, relying upon C. S., 3055. We cannot sustain the defendant's contention.

C. S., 3055, is as follows: "The instrument must be exhibited to the person from whom payment is demanded, and, when it is paid, must be delivered up to the party paying it." Ordinarily this must be done, but not so when the instrument is lost or destroyed.

The defendant having admitted the execution of the note and plead payment, the burden was on the defendant to prove payment. *Collins v. Vandiford, ante,* at p. 239.

The defendant testified: "I walked over there and asked Mr. Graham was the note in the bank, and he said 'Yes'; and I paid Mr. Graham, and I am satisfied he gave me the note, and *I think I walked out and tore it to pieces and threw it in the street.*"

Plaintiff's evidence was to the effect that the note had not been paid, but was lost, and for that reason could not be produced on the trial, further, that diligent search had been made for the note. *Mahoney v. Osborne,* 189 N. C., 445; *Bank v. Brickhouse,* 193 N. C., 231.

Speaking to the subject in 3 R. C. L., under Bills and Notes, etc., sec. 568-569, p. 1336, is the following: "The general rule is, that where a writing is merely the evidence of a contract, its loss or destruction does not destroy the cause of action, but renders secondary evidence admissible. Where, however, from the nature of the contract, the party answerable on it is entitled to have the writing delivered up to him, for his security, or to enable him to enforce his rights under it, when he is called on to perform it, as in the case of a negotiable bill or note, if it is lost or destroyed, an action is not maintainable on it, unless his rights can be fully secured by a bond of indemnity or other sufficient security." *Shields v. Whitaker,* 82 N. C., at p. 518; *Fisher v. Webb,* 84 N. C., at p. 48; *Insurance Co. v. Gavin,* 187 N. C., p. 14.

This Court has held that recovery can be had upon a lost or destroyed note, and upon satisfactory evidence of the fact the witness can testify as to the note itself. Many cases in this connection suggest the propriety of requiring a bond of the plaintiff to protect the maker of the lost or destroyed instrument. In this case the defendant requested no such bond and the judge did not require it of his own motion. In fact, defendant testified that he "tore it to pieces and threw it in the street."

The defendant's second exception and assignment of error was to the effect that the jury having answered the third issue "Yes," that defendant was entitled to judgment and tendered same, which the court below refused to sign. In this we think there was no error. To sustain this contention defendant relied on the following act:

"If any person shall, with a view to evade the payment of taxes, fail or refuse to give in to the assessing officer any bonds, notes, claims, or other evidence of debt which are subject to assessment and taxation under this act, the same shall not be recoverable at law or suit in equity before any of the courts of this State until they have been listed and the tax paid thereon, together with any and all penalties prescribed by law for the nonpayment of taxes." Public Laws 1927, ch. 71, sec. 64, under (24) at p. 145.

Before rendering judgment the court below allowed plaintiff to list the note for the tax and pay the tax and penalty. We think, under the above statute, the court below had this power and *allowed no recovery* until the tax and penalty was paid.

In *Hyatt v. Holloman,* 168 N. C., at p. 388, it is said: "We have said in *Martin v. Knight,* 147 N. C., 564, that a failure to list a solvent credit pursuant to the statute does not prevent recovery in an action thereon, but postpones the recovery of judgment until it is listed and the taxes are paid."

In *Corey v. Hooker,* 171 N. C., at p. 232, it is said: "In any event, defendants would have the right to pay the taxes into court, as they have offered to do if liable therefor."

Forfeitures are not favored either at law or in equity, and courts are inclined to construe an act of this kind so as to prevent a forfeiture. We think the evidence on the first issue sufficient to be submitted to the jury.

No error.

G. W. McCLURE v. W. P. CROW and LILLIE CROW, His Wife, and W. T. CROW and LENA CROW, His Wife.

(Filed 20 February, 1929.)

1. **Deeds and Conveyances—Requisites and Validity—Acknowledgment —Witnesses.**

In order to a valid probate of a deed to lands before a justice of the peace by an attesting witness, the witness must be sworn and his evidence taken by the probate officer as his judicial or *quasi*-judicial act.

2. **Same—Validating Void Deeds.**

Where the probate of a deed is fatally defective on its face as to the examination under oath of a subscribing witness, it is not open to proof as against the rights of an innocent subsequent purchaser that in fact the witness was examined by the probate officer, under oath, so as to show that in fact the witness was examined as the statute requires.

3. **Deeds and Conveyances — Recording and Registration — Notice — Acknowledgment.**

In order for a registered deed to give constructive notice to creditors or purchasers for value, the probate must not be defective upon its face as to a material requirement, and where the probate is taken upon the examination of an attesting witness it must actually or constructively appear upon the face of the probate that the certificate was made upon evidence taken of the subscribing witness under oath, and if not so appearing the registration of the deed is insufficient to give the statutory notice. C. S., 3309, 3293.

4. **Adverse Possession—Color of Title.**

Where the probate of a deed to lands is fatally defective it is not color of title against the grantor in a later registered deed, under sufficient probate, from a common grantee; but where there is evidence that title to the lands had been acquired under twenty years adverse possession this question should be submitted to the jury. C. S., 430.

APPEAL by plaintiff from *MacRae, Special Judge,* at April Term, 1928, of CHEROKEE.

The plaintiff alleged that he was the owner of a tract of land containing 140 acres, and that the defendants claimed title thereto. He brought suit to have the claim of the defendants declared void as a cloud upon his title. The defendants denied that the plaintiff had title to the land, alleged that they were the owners in fee, and prayed that the plaintiff's claim be declared a cloud upon their title and adjudged to be of no effect. Both parties claimed title under one A. C. Berry.

The plaintiff introduced a grant for the land in controversy (No. 3472) to D. F. Ramsour, dated 12 June, 1871, and registered 8 January, 1872; also a deed from A. C. Berry to the plaintiff dated 27 February, 1903. This deed purports to have been signed under seal by A. C. Berry and to have been witnessed by E. F. Burgess and W. L. McNabb. The certificate and probate are as follows:

State of North Carolina—Cherokee County—ss.

Before me, U. S. G. Phillips, a justice of the peace of said county, personally appeared W. L. McNabb, the within named witness, with whom I am personally acquainted, and who acknowledged that he saw the deed signed by A. C. Berry for the purposes therein expressed.

Witness my hand and seal of office on this 28th day of December, 1906.

U. S. G. PHILLIPS,
Justice of the Peace.

North Carolina—Cherokee County.

The foregoing certificate of U. S. G. Phillips, a justice of the peace in and for the county of Cherokee and State of North Carolina, attested by his .... seal, is adjudged to be correct and sufficient; therefore, let the instrument with certificate be registered.

Witness my hand this the 31st day of December, A.D. 1906.

A. A. Fain,
Clerk Superior Court.

Upon the certificate and probate the deed was registered 31 December, 1906.

The trial judge held that the certificate of the justice and the probate of the clerk were insufficient in law, and that no title passed to the plaintiff by virtue of the deed. He held in addition, the parties claiming from a common source, that the deed was not effective as color of title.

The plaintiff withdrew her motion for voluntary nonsuit, the defendants offered evidence, and at the conclusion of the evidence the defendants' motion to nonsuit the plaintiff on his cause of action was allowed. Upon the defendants' counterclaim two issues were submitted, and to each the jury gave an affirmative answer: 1. Are the defendants the owners of the land described in the complaint and answer? 2. Does the plaintiff's claim constitute a cloud upon the title of the defendants? It was therefore adjudged that the defendants are the owners of the land; that the plaintiff's claim is a cloud on the defendants' title, and that it be canceled and removed. The plaintiff appealed upon assignments of error which are set out in the opinion.

D. Witherspoon and M. W. Bell for the plaintiff.

Moody & Moody and J. D. Malonee for defendants.

Adams, J. The plaintiff and the defendants claim the land in controversy under A. C. Berry as a common source of title. The deed from Berry to the plaintiff was dated 27 February, 1903, and registered 31 December, 1906; the deed from Berry to W. T. Crow was dated 18 February, 1909, and registered 1 February, 1910.

No conveyance of land shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor or lessor, but from the registration thereof in the county where the land lies, and no notice however full and formal as to the existence of a prior deed can take the place of registration. C. S., 3309; *Allen v. R. R.,* 171 N. C., 339; *Dye v. Morrison,* 181 N. C., 309; *Wimes v. Hufham,* 185 N. C., 178. Taking the acknowledgment or proof of a deed or admitting it to probate is a judicial or *quasi*-judicial act, and if the acknowledgment or proof of probate is defective on its face the registration of the instrument imparts no constructive notice and the deed will be treated as if unregistered. *Norman v. Ausbon,* 193 N. C., 791; *Bank v. Tolbert,* 192 N. C., 126; *Woodlief v. Woodlief, ibid.,* 634; *Cowan v. Dale,* 189 N. C., 684; *Fibre Co. v. Cozad,* 183 N. C., 600; *King v. McRackan,* 168 N. C., 621; *Withrell v. Murphy,* 154 N. C., 82; *Allen v. Burch,* 142 N. C., 524; *Long v. Crews,* 113 N. C., 256.

The execution of all deeds of conveyance may be proved or acknowledged before any one of designated officials. C. S., 3293. They shall be acknowledged by the grantor or his signature shall be proved on oath by one or more witnesses in the manner prescribed by law; and all deeds executed and registered according to law shall be valid. C. S., 3308. The substantial form of the grantor's acknowledgment is prescribed in section 3323. "Probate of a deed is taken by hearing the evidence touching its execution; *i. e.,* the testimony of witnesses, or the acknowledgment of the party, and from that evidence *adjudging the fact* of its due execution." *Pearson, J.,* in *Simmons v. Gholson,* 50 N. C., 401. If the execution of a deed is to be proved by a subscribing witness the statute requires an examination of the witness upon his oath. The reason is given in *Holmes v. Marshall,* 72 N. C., 37: "If no probate by oath were required, it would probably happen that many false and unreal deeds, etc., would be registered, and the public would have no probable ground to believe in the genuineness of any of them." There must, therefore, be a substantial compliance with the statutory requirement. *Devereux v. McMahon,* 102 N. C., 284; *Finance Co. v. Cotton Mills,* 182 N. C., 408; *Woodlief v. Woodlief, supra.*

The registration of a deed on a probate which is apparently regular is prima facie evidence of its due execution. *Strickland v. Draughan,* 88 N. C., 315; *Quinnerly v. Quinnerly,* 114 N. C., 145; *Mabe v. Mabe,* 122 N. C., 552; *Cochran v. Improvement Co.,* 127 N. C., 386; *Power Co. v. Power Co.,* 168 N. C., 219. It is otherwise when the probate upon its face is fatally defective. From a certificate that a deed was "duly proved" it may be understood that the execution was shown by the oath of the subscribing witness, or that his death was proved and his handwriting duly established; but, as said in *Horton v. Hagler,* 8 N. C., 48, "when the certificate enters into detail and shows in what manner the deed was proved, the inquiry into the legality of proof is open to the court." *Howell v. Ray,* 92 N. C., 510; *Evans v. Etheridge,* 99 N. C., 43; *Anderson v. Logan, ibid.,* 474; *Lance v. Tainter,* 137 N. C., 249; *Cozad v. McAden,* 148 N. C., 10; *Wood v. Lewey,* 153 N. C., 401; *Shingle Mills v. Lumber Co.,* 171 N. C., 410; *Ibid.,* 178 N. C., 221; *Fibre Co. v. Cozad,* 183 N. C., 600.

In *Starke v. Etheridge,* 71 N. C., 240, one of the agreed facts was that the deed had been proved on the oath of the subscribing witness, and the clerk endorsed upon the deed as a memorial of the proof the word "jurat," the primary meaning of which, the court said, is "sworn," the derivative meaning being "proved." *Moore v. Quickle,* 159 N. C., 128. It is with this fact in mind that we must interpret the clause, "the witness did in fact acknowledge the deed," appearing at the bottom of page 409 in *Finance Co. v. Cotton Mills, supra.*

Our opinion is that the probate of the deed in question is defective, the mere acknowledgment by the witness that he saw the deed signed by Berry falling short of the plain requirement that the execution must be proved by the witness on his oath.

The plaintiff offered to prove by the justice of the peace who took the "acknowledgment" of McNabb, one of the subscribing witnesses, and by McNabb himself, that McNabb testified on oath before the justice that Berry signed the deed in the presence of both witnesses. We find no error in the exclusion of this evidence. Neither *Starke v. Etheridge, supra,* nor *Quinnerly v. Quinnerly, supra,* nor *Bailey v. Hassell, supra,* supports the appellant's position. The first two of these cases hold that evidence is admissible to show that what purports to be a deed is a forgery, or that it was executed by a married woman or an infant, or that it was not properly executed, and that the registration of an instrument may be impeached in this way or supported by evidence tending to sustain the officer's finding as stated in his certificate. *Bailey v. Hassell, supra,* which was a controversy between the immediate parties or their representatives, is not authority for the position that parol evidence may be heard, long after the rights of innocent third parties have intervened, to validate an invalid probate by adding to or contradicting its terms. The opposite conclusion is maintained in *Butler v. Butler,* 169 N. C., 584: "There is much conflict of authority as to the power of a judicial officer to amend his certificate of probate after the instrument he is probating has passed from his hands, but it seems that the weight of authority is against the exercise of the power (1 Devlin on Deeds, sec. 539, *et seq.),* and all agree that it is a power fraught with many dangers. The higher judicial tribunals are not permitted to correct their records without notice to the parties and without an opportunity to be heard, and if the position of the defendant can be maintained, a justice of the peace, who has no fixed place for the performance of his official duties, may at any time, and when parties cannot be heard, change his certificate of probate and materially affect the titles to property." And this conclusion is supported by an array of authorities cited in the concurring opinion of *Walker, J.*

The plaintiff next insisted that his deed is color of title, citing three cases which we think are not in point. In *Smith v. Proctor,* 139 N. C., 314, it was held that a tax deed conveying the interest of a life tenant is not color of title against the remaindermen; in *Norwood v. Totten,* 166 N. C., 648, the defendants were the grantor's heirs; and the decision in *Power Co. v. Power Co., supra,* is obviously not applicable to the present case.

In *Austin v. Staten,* 126 N. C., 783, the plaintiff and the defendants claimed under the same parties. The plaintiff's deed was dated and registered on 31 March, 1896, and that of the defendants was dated 3 December, 1887, and registered 3 May, 1897. Under the registration act the plaintiff had the superior right because his deed had been first registered, and the defendant's contention that his deed was color of title was disallowed. In this conclusion we find no error. *Collins v. Davis,* 132 N. C., 106; *Janney v. Robbins,* 141 N. C., 400; *Gore v. McPherson,* 161 N. C., 638; *Moore v. Johnson,* 162 N. C., 267; *King v. McRackan, supra; Johnson v. Fry,* 195 N. C., 832.

We are of opinion, however, that his Honor erred in directing a verdict upon the two issues set out in the judgment. There is at least some evidence of the plaintiff's adverse possession of the land for a period of twenty years. C. S., 430. *Johnson v. Fry, supra.* For this reason the appellant is entitled to a

New trial.

IN RE M. M. VEASEY.

(Filed 20 February, 1929.)

1. **Extradition—Grounds Therefor and Defenses—Charge of Crime and Fugitive from Justice—Habeas Corpus.**

   One who is sought to be extradited may contest the validity of the extradition proceedings on writ of *habeas corpus* by showing as a matter of law from the requisition papers and the accompanying indictment and affidavit of the demanding state that he is not charged with a crime in the demanding state; and also as a matter of fact to be determined by the evidence that he is not a fugitive from justice therefrom.

2. **Same—Requisition and Governor's Warrant—Constitutional Law.**

   Where the governor of one state receives the requisition for a fugitive from another state who has violated the criminal laws of the latter state, it is his duty to issue a warrant of arrest for the fugitive if the requisition papers are in proper form. Art. IV, sec. 2, Federal Constitution; U. S. Revised Statutes 1918, sec. 10126.

3. Same—Requisites of Requisition Papers.

The warrant of the governor of the asylum state for the arrest of one for extradition should disclose upon its face that a demand has been made by the governor of the demanding state for the party in custody as a fugitive that the demand was accompanied by a copy of the indictment or affidavit charging him with the commission of the crime within the demanding state; that the copy of the indictment or affidavit was certified as authoritative; that the person demanded is a fugitive from justice.

4. Same—Innocence.

One whose extradition is sought may not resist the extradition by proof in *habeas corpus* proceedings of his innocence of the offense charged.

5. Appeal and Error—Review—Burden of Showing Error—Extradition.

Upon *certiorari* from the Supreme Court in *habeas corpus* proceedings in matters of extradition, the burden is on the party alleging error in the judgment of the lower court to show it, and when it does not appear of record that the petitioner had been charged with crime by and within the state of demand, the judgment of the lower court that the prisoner be discharged will be upheld.

APPLICATION by the State of Georgia and the State of North Carolina for *certiorari* to review judgment of *Moore, Special Judge,* rendered 16 June, 1928, in the Superior Court of BERTIE, on return to writ of *habeas corpus* in which M. M. Veasey, sought to be held as a fugitive from justice from the State of Georgia, was discharged from custody, it being found upon the hearing, in substance: (1) That the prosecution was not instituted in good faith, but for the purpose of collecting a debt; (2) that the accused had committed no crime in the State of Georgia, and (3) that he was not a fugitive from the justice of said state.

It appears from the record that the petitioner, M. M. Veasey, was arrested on a warrant issued by P. T. Perry, a justice of the peace of Bertie County, charging him, under C. S., 4550, with having uttered a worthless check in the State of Georgia, contrary to the criminal laws of that state, and with being a fugitive from the justice of the said state.

Pending a hearing upon said warrant, the defendant therein sued out a writ of *habeas corpus* to test the validity of his arrest and restraint of liberty, and "while in the process of this *(habeas corpus)* hearing, J. W. Cooper, sheriff of Bertie County, in open court, served extradition warrant, issued by the Governor of North Carolina, upon the same charge as contained in the said warrant of P. T. Perry, justice of the peace," etc.

To review the order of discharge, upon the grounds above stated, application for writ of *certiorari* was duly filed in the Supreme Court, and writ ordered to issue.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. Elmer Long for State of Georgia.

Craig & Pritchett and J. B. Davenport for M. M. Veasey.

STACY, C. J. The petitioner, M. M. Veasey, was arrested under C. S., 4550, which provides that any Justice of the Supreme Court, or any judge of the Superior Court or of any criminal court, or any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, on satisfactory information laid before him that any fugitive or other person in the State has committed, out of the State and within the United States, any offense which, by the law of the state in which the offense was committed, is punishable either capitally or by imprisonment for one year or upwards in any state prison, has full power and authority, and is required, to issue a warrant for such fugitive or other person and commit him to any jail within the state for the space of six months, unless sooner demanded by the public authorities of the state wherein the offense may have been committed, pursuant to the act of Congress in that case made and provided, and if no such demand be made within that time the person arrested is entitled to be liberated, unless sufficient cause be shown to the contrary.

It was on a warrant, issued by virtue of this statute, that the petitioner was held at the time he sued out a writ of *habeas corpus.*

Upon the findings made by his Honor below, and the conclusions drawn therefrom, we are of opinion that no error was committed in the order of discharge from arrest under the warrant issued by P. T. Perry, justice of the peace.

It appears, however, that during the *habeas corpus* proceeding, the sheriff of Bertie County, in open court, served upon the petitioner an extradition warrant issued by the Governor of North Carolina for the arrest of the accused on the same charge as that contained in the warrant of the justice of the peace.

Application for writ of *certiorari* was made to this Court to review the action of the judge in not holding the accused under the extradition warrant of the Governor, but this warrant is not in the record and apparently it was not offered on the hearing as the sheriff's authority for holding the accused.

One who is sought to be extradited may contest the validity of the extradition proceedings on writ of *habeas corpus* by showing (1) that he is not charged with a crime in the demanding state, or (2) that he is not a fugitive from the justice of the demanding state. Both of these are jurisdictional matters, and, if the accused can establish either, he is entitled to be discharged from custody. The first is a question of law to be determined upon the face of the requisition and the indictment or affidavit accompanying it, the law of the demanding state, of course, furnishing the test, while the second is a question of fact which, when controverted, may be established by evidence like any other disputed fact. *Com. ex. rel. Flower v. Supt. of Prison,* 220 Pa., 401, 69 Atl., 916, 21 L. R. A. (N. S.), 939; *S. v. Adams,* 192 N. C., 787, 136 S. E., 116.

On receipt of a requisition in proper form, it is the duty of the governor of the asylum state, under the Federal Constitution (Art. IV, sec. 2) and act of Congress (U. S. Comp. Stat., 1918, sec. 10126), to issue his warrant for the arrest of the accused. This, when challenged on *habeas corpus* proceeding, should disclose on its face: (1) That a demand by the executive has been made for the party in custody as a fugitive from justice, and that the demand is accompanied by a copy of the indictment or affidavit, charging him with having committed a crime within the demanding state; (2) that the copy of such indictment or affidavit was certified as authentic by the governor of the state making the demand; and (3) that the person demanded is a fugitive from justice. *Roberts v. Reilly,* 116 U. S., 80; *Ex parte Reggel,* 114 U. S., 642.

It is the generally accepted rule that an accused, held in the asylum state on an extradition warrant, issued pursuant to the requisition of the executive of the demanding state, cannot defeat his extradition by proof, on *habeas corpus* proceeding, of his innocence of the charge for which it is sought to extradite him, since the right to extradite does not depend on guilt, but on flight from charge of guilt. *Ex parte Larney,* 4 Ohio N. P., 304. Thus, it is the holding in many jurisdictions that the courts of the asylum state will not, on *habeas corpus* hearing, inquire into the guilt or innocence of the accused. This is a matter for the courts of the demanding state. *Drew v. Shaw,* 235 U. S., 432; *Munsey v. Clough,* 196 U. S., 364; Note, 21 L. R. A. (N. S.), 939.

In the instant proceeding the learned judge may have assigned, in part at least, the wrong reason for his judgment, if the extradition warrant were considered by him, but as the record fails to show any criminal charge against the accused in the State of Georgia—the requisition papers not having been sent up—we cannot say that the error, if any, is reversible.

On *certiorari,* as well as on appeal, the party who alleges error must show it. It is not presumed. *Jones v. Candler, ante,* 382.

Affirmed.

METROPOLITAN LIFE INSURANCE COMPANY v. RUTH BODDIE AND G. C. COLLINS, ADMINISTRATOR OF CARLTON H. BODDIE.

(Filed 20 February, 1929.)

Trial—Reception of Evidence—Objections and Exceptions.

Where evidence has been admitted at the trial and afterwards excluded on motion in the voluntary absence of appellant's counsel, an exception thereto made for the first time on the settlement of the case on appeal, is not taken in apt time and will not be considered on appeal.

APPEAL by plaintiff from *Barnhill, J.,* at October Special Term, 1928, of NASH. No error.

Action for cancellation of policy of insurance, upon allegation that the issuance of said policy was procured by false and fraudulent representations, which were material to the risk assumed by plaintiff.

Defendants denied said allegations, and demanded judgment that they recover on said policy, as beneficiaries named therein.

From judgment on an adverse verdict, plaintiff appealed to the Supreme Court.

Winston, Winston & Brassfield for plaintiff.
D. W. Perry and Austin & Davenport for defendants.

PER CURIAM. At the trial of this action in the Superior Court, Dr. J. A. Winstead, a physician, was offered as a witness for the plaintiff. He testified that on several occasions prior to the issuance of the policy of insurance, which is the subject-matter of this action, he had rendered medical services to the insured. This testimony was offered as evidence in support of the allegations in the complaint that the insured had made false and fraudulent representations with respect to his health, which were material to the issuance of the policy.

Defendants' objection to the plaintiff's question addressed to this witness, relative to the diseases for which he had treated the insured, was sustained, for that under the statute, C. S., 1798, information acquired by the witness, while attending the insured in a professional capacity, was privileged. The presiding judge, in the exercise of his discretion, refused to compel the witness to disclose this information. He declined to find that such disclosure was necessary to a proper administration of justice. *Ins. Co. v. Boddie,* 194 N. C., 199, 139 S. E., 238.

Subsequently, during the voluntary absence of plaintiff's counsel from the trial, defendants moved the court to strike out the testimony of Dr. Winstead, to the effect that he had rendered medical services to the insured prior to the issuance of the policy. This motion was allowed.

If counsel for plaintiff had been present, they would have excepted to the allowance of the motion. Whether or not, upon objection to the motion, defendants' counsel would have insisted upon it, does not appear.

While the case on appeal for this Court was being settled by the judge, in accordance with the provisions of C. S., 644, plaintiff's counsel, for the first time, requested that an exception be noted to the allowance of defendants' motion to strike out the testimony of Dr. Winstead. This request was denied by the judge, for the reason that the exception was not taken in apt time, and that the judge was without power to grant the request, made after the verdict had been returned, and the judgment signed.

The assignment of error based upon this exception cannot be considered by this Court. The exception was not taken in apt time. C. S., 590. *Alley v. Howell,* 141 N. C., 113, 53 S. E., 821. This is the only assignment of error relied upon by plaintiff on its appeal to this Court. As it cannot be considered, the judgment is affirmed. There is

No error.

DANIEL F. SIMMONS v. ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, LTD., AND C. T. McCLENAGHAN.

(Filed 20 February, 1929.)

Removal of Causes—Diversity of Citizenship—Separable Controversy.

Where there is only one valid and subsisting cause of action stated in the complaint, a removal of the cause to the Federal Court upon petition of the nonresident defendant is not error when the amount is within the jurisdiction of the Federal courts.

APPEAL by plaintiff from *Small, J.,* at November Term, 1928, of BEAUFORT.

Motion to remove suit to the District Court of the United States for the Eastern District of North Carolina for trial. Motion allowed as to cause of action on contract, insurance policy, from which plaintiff appeals, assigning error.

MacLean & Rodman for plaintiff.

Ward & Grimes, Thomas Creekmore and Pou & Pou for defendants.

PER CURIAM. A critical analysis of the complaint leaves us with the impression that only one valid, subsisting cause of action (based on the policy of insurance) has been stated therein. The other matters alleged, even if properly joined in an action on the contract of insurance, which may be doubted if intended to set up a separate and independent action in tort, apparently have resulted in no injury to the plaintiff as alleged, and may not. And with respect to plaintiff's gun, it is not alleged that any demand has been made for its return.

We find no error in the removal of the suit to the Federal Court for trial on the ground of diversity of citizenship.

Affirmed.

CHARITY ELLEN BARNES v. SALLIE BEST AND JOHNNIE BEST.

(Filed 27 February, 1929.)

1. **Wills—Construction—Estates and Interests Created—Rule in Shelley's Case.**

A devise of an estate to the testator's wife for life then to his daughter "and to her heirs lives of her body, if no living heirs of her body at her death" with limitation over: *Held,* the words "no living heirs of her body at her death" are construed as *discriptio personarum* of those who are to take according to the intent of the testator and there being no children of the daughter, the limitation over takes effect as the stock of a new descent, by purchase, and the rule in *Shelley's case* has no application.

2. **Same.**

A devise of a life estate to the wife of the testator and then to his daughter "and to her heirs lives of her body, if no living heirs of her body at her death, to B.": *Held,* assuming that the daughter was to take a base or qualified fee under the will, upon her death without children B. took a fee-simple estate in the lands unaffected by the rule in *Shelley's case.*

APPEAL by defendants from *Midyette, J.,* at January Term, 1929, of WAYNE.

Civil action to determine title to real estate, submitted on an agreed statement of facts.

It was agreed that if, under the facts submitted, the court was of opinion the plaintiff is the owner of the land in question, judgment should be entered so declaratory of her rights, but, if the court should be of opinion that the defendants are the owners of said land, then judgment to that effect should be rendered; in either case, however, the judgment to be binding on all the parties.

The court being of opinion that the plaintiff is the owner of the lands in question and entitled to the immediate possession thereof, entered judgment accordingly, from which the defendants appeal, assigning errors.

Langston, Allen & Taylor for plaintiff.
Wellons & Wellons for defendants.

STACY, C. J. On the facts agreed, the question presented was properly made to depend upon the construction of the following item in the will of Bennett Barnes:

"Item 4. After the death of my wife, Saletha Barnes, I give unto my daughter, Polly Ann Barnes, all my estate real and personal not already given away in legacies to her and to her heirs lives of her body, if no living heirs of her body at her death, all my land east of the road leading from upper Black Creek Church to Memorial Church to Charity Ellen Barnes, daughter of Edwin H. Barnes, and all west of said road to G. F. Watson."

The case states that Saletha Barnes, widow of Bennett Barnes, died several years ago, and that Polly Ann Barnes (now Polly Ann Barnes Watson), daughter of testator, died during the year 1928, without leaving any child or children her surviving, as no child was ever born to her. She did leave a will, however, in which she devised all of her property to John M. Best and wife, Sallie Best. It is under this will that the defendants claim title to all the Bennett Barnes land "lying on the east side of the road leading from upper Black Creek Church to Memorial Church."

Charity Ellen Barnes, on the other hand, contends that she is the owner of said land by reason of the ulterior limitation contained in Item 4 of the will of Bennett Barnes.

It is conceded that the controversy between the parties depends upon whether the limitations in the above clause of the will of Bennett Barnes "to Polly Ann Barnes and to her heirs, lives of her body, if no living heirs of her body at her death, to Charity Ellen Barnes," are so framed as to attract the rule in *Shelley's case* and thus vest in Polly Ann Barnes a fee-simple estate in all the land owned by her father at the time of his death, which lies on the east side of the road leading from Upper Black Creek Church to Memorial Church.

His Honor was of opinion that the limitation "to Polly Ann Barnes and to her heirs, lives of her body, if no living heirs of her body at her death, to Charity Ellen Barnes," did not call for the application of the rule in *Shelley's case,* and in this we are disposed to concur.

It has been held in a number of cases that when words of explanation are superadded or annexed to the words "heirs" or "heirs of the body," indicating an intention on the part of the grantor or testator to use said terms in a qualified sense, as a mere *descriptio personarum* or particular description of certain individuals, who are themselves to become the roots of a new inheritance or the stock of a new descent, then, in all such cases, the words "heirs" or "heirs of the body" are to be treated as words of purchase and not words of limitation of the estate of the ancestor. *Hampton v. Griggs,* 184 N. C., 13, 113 S. E., 501; *Ford v. McBrayer,* 171 N. C., 420, 88 S. E., 736; *Smith v. Proctor,* 139 N. C., 314, 51 S. E., 889.

But, without pursuing the arguments, elaborated in briefs of counsel, we deem it sufficient to say that the limitation to the heirs of Polly Ann Barnes, "lives of her body," does not appear to be "after the similitude of a remainder," hence the rule in *Shelley's case* would seem to have no application to the provisions of the will now under consideration. *Benton v. Baucom,* 192 N. C., 630, 135 S. E., 629.

Assuming that Polly Ann Barnes took a base or qualified fee in the property in question, this, under the terms of her father's will, was to be defeated upon her dying without children, "lives of her body," living at her death, and in such event, which has happened, the *locus in quo* was to go to Charity Ellen Barnes. His Honor so held, and the judgment is

Affirmed.

M. W. OVERTON v. FARMERS MANUFACTURING COMPANY ET AL.

(Filed 27 February, 1929.)

Master and Servant—Master's Liability for Injuries to Servant—Warning and Instructing Servant.

Where there is evidence that a totally inexperienced employee is instructed by the superintendent of a manufacturing company to assist another, an experienced employee, in putting a blow pipe in a boiler for the purpose of its repair, and upon the assurance of safety and under immediate direction of the other employee he taps with a hammer a certain pipe, and suddenly steam envelopes him, causing the injury in suit: *Held,* sufficient to take the case to the jury upon the issue of the defendant's actionable negligence. *White v. Power Co.,* 151 N. C., 356 distinguished. *Fowler v. Conduit Co.,* 192 N. C., 14, cited and applied.

CIVIL ACTION, before *Small, J.,* at December Term, 1928, of GATES.

The defendants operated a sawmill with three boilers, each incased separately in a big wall. The incasement had a door or opening at the rear of the boiler through which workmen could enter and repair the boiler or remove ashes and cinders. An iron pipe descended from the bottom of the boiler two or three feet to the level of the ground, fitting into an elbow projecting out of the back wall. The pipe was intended to relieve the boiler of scales and other accumulations. The pipe was also intended as a means of blowing out the boiler. The horizontal part of the pipe was disconnected, leaving the descending or perpendicular part and the elbow suspended from the boiler. On the morning of 12 June, 1926, plaintiff was directed by the superintendent to assist in putting a blower pipe on the boiler. The plaintiff said: "I had not had any experience in working around boilers; I had never fired a day or worked around a boiler a day, and had had no experience in repairing or working on boilers. . . . Mr. Worthington told me to go to the shop and help Mr. Manseau put in a blower pipe to the boiler. I asked him if the boiler was clear, and he told me that it was—that it broke down about 2 o'clock and blowed out. I had nothing to do with the boiler. No other instructions were given to me by any one with respect to how to do the work or the dangers, if any, involved in it, and I had no knowledge of the dangers incidental to the work. I told Mr. Manseau that Mr. Worthington had sent me to help put in a blower pipe, and he said, 'All right,' and I said, 'Is the boiler clear?' and he said, 'Yes, she broke down about 2 o'clock.' . . . I crawled through the hole left in the brick wall under the boiler. I was in the hole up to across the middle of my thighs. My feet were sticking out of the hole in the brick wall. . . . When I got to where I could reach it with a hammer John said: 'Touch it with a hammer and see if it is loose,' and I touched it and it was loose, and I tapped it the next time a little bit harder, and the steam and hot water just covered me up that quick; it was just like a gun fire underneath there. I didn't know what happened for a second. The steam shot out like a gun-shot and hit me in the face and eyes and head and breast, and I pulled my cap down to protect my eyes."

The injuries sustained by plaintiff were serious and permanent. The issues were answered in his favor, and the jury assessed the damages at $10,000.

From judgment upon the verdict the defendants appealed.

Costen & Costen and Ehringhaus & Hall for plaintiff.
A. P. Godwin and Ward & Grimes for defendants.

BROGDEN, J. The boiler was out of repair, and the plaintiff, a workman, having no knowledge of boilers, was directed by his foreman to assist in making the necessary repairs. The plaintiff testified that he was directed to strike the descending pipe of the boiler with a hammer, and that as a result thereof a large volume of hot steam was released upon his body. Moreover, there was evidence in behalf of the plaintiff that he was given positive assurance by his foreman that the boiler contained no steam.

This testimony, which was accepted by the jury, takes the case out of the principle announced in *White v. Power Co.,* 151 N. C., 356, 66 S. E., 210, upon which the defendants rely.

The liability of the employer in the case at bar is governed by the principles announced in *Fowler v. Conduit Co.,* 192 N. C., 14, 133 S. E., 188, to the effect that liability results where the employer gives assurance of safety or where the work is done under his supervision and in accordance with his instructions. *Atkins v. Madry,* 174 N. C., 187, 93 S. E., 744; *McKinney v. Adams,* 184 N. C., 565, 115 S. E., 51; *Hairston v. Cotton Mills,* 188 N. C., 557, 125 S. E., 124.

No error.

L. D. ROEBUCK AND WIFE, HANNA ROEBUCK, v. J. J. CARSON AND J. L. GURGANUS, TRUSTEE.

(Filed 27 February, 1929.)

1. **Evidence—Parol or Extrinsic Evidence Affecting Writings—Explaining or Modifying Terms of Written Instrument.**

   Where a written contract is sued on, it may be shown in defense by parol in contradiction thereof that the writing was to be effective only upon certain contingencies which had not happened, or to show a different method of payment, or where a modification has been made after the execution of the writing, providing the matters resting in parol are not required by law to be in writing.

2. **Same—Bills and Notes.**

   Where notes in series are to mature at different specified dates, fully stating the amounts of each and the interest to be paid thereon, a contemporaneous oral agreement that upon the payment of a certain bonus the notes were to run for the life time of the maker is in contradiction of the notes as written, and may not be set up as a defense to an action on the notes.

CIVIL ACTION, before *Barnhill, J.,* at January Term, 1929, of MARTIN.

On 15 November, 1926, the plaintiff, L. D. Roebuck, borrowed from the defendant, Carson, the sum of $6,500, executing and delivering to the defendant as evidence thereof five promissory negotiable notes. Four of said notes were executed in the sum of $1,000 each, payable on 15 November, in the years 1927, 1928, 1929, and 1930. The remaining note of $2,500 was payable on 15 November, 1931. Plaintiff and his wife, in order to secure said notes, executed and delivered a deed of trust upon a certain tract of land, in which deed of trust the defendant, Gurganus, was named as trustee. Default having been made in the payment of the notes, the trustee advertised the land for sale on 24 November, 1928. Thereupon, the plaintiff applied for an injunction to restrain the sale of said property, alleging "that at the time of the execution and delivery of the notes and deed of trust . . . there was a contemporaneous verbal agreement entered into by and between the plaintiff and the defendant according to the terms of which the defendant promised and agreed that if the plaintiff would pay him a bonus of $500 that the defendant would carry said loan during the term of his natural life, . . . provided and upon condition that the plaintiff pay to him each year the interest on said loan at six per cent per annum during said period. And this agreement was entered into by and between the plaintiff and the defendant, notwithstanding the fact that said notes above mentioned, upon their face, would become due and payable as above set out, and said defendant, regardless of what is stated in said notes, made the loan upon this verbal agreement, etc."

The verbal agreement alleged by the plaintiff was denied in the answer.

The cause was heard and the following judgment entered, to wit: "Upon consideration of the pleadings, the court is of the opinion and doth so adjudge, that the restraining order heretofore issued be and the same is hereby dissolved."

From said judgment plaintiff appealed.

A. R. Dunning and B. A. Critcher for plaintiff.
Spruill & Spruill for defendant.

BROGDEN, J. If promissory, negotiable notes are duly executed and delivered, payable upon certain dates therein specified, can the maker thereof, as against the payee therein, set up a contemporaneous verbal agreement to the effect that the notes would not become payable until the death of the maker?

The principle of law governing the controversy is thus stated in *Fertilizer Co. v. Eason,* 194 N. C., 244, 139 S. E., 376: "If a contract is not within the statute of frauds the parties may elect to put their agreement in writing, or to contract orally, or to reduce some of the terms to writing and leave the others in parol. If a part be written and a part verbal, that which is written cannot ordinarily be aided or contradicted by parol evidence, but the oral terms, if not at variance with the writing, may be shown in evidence; and in such case they supplement the writing, the whole constituting one entire contract."

The test is whether the oral terms vary or contradict the writing. This idea was expressed by the Court in *White v. Fisheries Co.,* 183 N. C., 228, 111 S. E., 182, as follows: "It is true that a contract may be partly in writing and partly oral (except when forbidden by the statute of frauds), and that in such cases the oral part of the agreement may be shown. But this is subject to the well established rule that a contemporaneous agreement shall not contradict that which is written. The written word abides, and is not to be set aside upon the slippery memory of man."

The alleged contemporaneous agreement, in the case at bar, clearly varies or contradicts the express terms of the notes. The exact point was decided in *Hilliard v. Newberry,* 153 N. C., 104, 68 S. E., 1056, in which the Court said: "The claim that there was a contemporaneous oral agreement to the effect that the time could be further extended is in direct contradiction to the written stipulation of the agreement, and under several recent decisions of the Court such a position was not open to defendant." *Walker v. Venters,* 148 N. C., 388, 62 S. E., 510; *Boushall v. Stronach,* 172 N. C., 273, 90 S. E., 198; *Cherokee County v. Meroney,* 173 N. C., 653, 92 S. E., 616; *Mfg. Co. v. McCormick,* 175 N. C., 277, 95 S. E., 555.

There are certain exceptions to the rule recognized by law. The most frequent exceptions may be classified as follows:

1. Parol evidence is admissible to show that the contract was delivered upon condition precedent, or that the obligation was not to be assumed at all except upon certain contingencies. *Evans v. Freeman,* 142 N. C., 61, 54 S. E., 847; *Aden v. Doub,* 146 N. C., 10, 59 S. E., 162; *Basnight v. Jobbing Co.,* 148 N. C., 350, 62 S. E., 420; *Building Co. v. Sanders,* 185 N. C., 328, 117 S. E., 3; *Overall Co. v. Hollister Co.,* 186 N. C., 208, 119 S. E., 1.

2. Parol evidence is admissible to show a different method of payment. *Bank v. Winslow,* 193 N. C., 470, 137 S. E., 320.

3. The rule excluding parol evidence because it varies or contradicts the written contract does not apply when a modification of the contract is made after the contract has been executed, unless of course the law requires a writing. *Freeman v. Bell,* 150 N. C., 146, 63 S. E., 682; *McKinney v. Matthews,* 166 N. C., 576, 82 S. E., 1036; *Fertilizer Co. v. Eason,* 194 N. C., 244, 139 S. E., 376.

The facts disclosed in the present record do not bring the case at bar within any of the exceptions recognized by law, and therefore the ruling of the trial judge was correct.

Affirmed.

N. W. WILLIAMS ET AL. v. SAM WILLIAMS.

(Filed 27 February, 1929.)

Infants—Property and Conveyances—Right to Set Aside Conveyance—Ratification.

A minor who has sold his interests in lands at a certain price may not when coming of age receive the amount of the purchase price from the clerk of the court, with full knowledge of the facts, wait for four years and seek to disaffirm the transaction and have it set aside, his acts being a ratification of the sale.

APPEAL by movant from *Nunn, J.,* at September Term, 1928, of WAYNE.

Motion by defendant to set aside all orders and decrees affecting his interests, entered in this special proceeding which was instituted 10 November, 1914, for the purpose of having the lands of Robert Williams, late of Wayne County, partitioned among his heirs at law. The final decree of confirmation was entered 7 June, 1915.

The defendant, while a minor, sold his interest in said lands for $360, which amount he received from the clerk of the court 10 October, 1923, upon arriving at his majority and with full knowledge of the facts. More than four years thereafter, to wit, on 31 December, 1927, the present motion was filed by the defendant, Sam Williams.

From an order denying the defendant's motion, he appeals, assigning errors.

D. H. Bland for plaintiffs.
Shaw & Jones for defendant.

STACY, C. J. The defendant, after reaching his majority and with full knowledge of all the facts, accepted $360 for his one-sixth interest in the lands of Robert Williams, deceased. This was a ratification of the sale previously made, and the Court will not now permit him to upset the proceeding by motion in the present cause filed more than four years after such ratification. *Smith v. Gray,* 116 N. C., 311, 21 S. E., 200; *Long v. Rockingham,* 187 N. C., 199, 121 S. E., 461.

Affirmed.

W. P. JENNINGS v. J. W. KEEL.

(Filed 27 February, 1929.)

1. **Fraud, Statute of—Promise to Answer for Debt or Default of Another —Applicability and Defenses—Consideration.**

Where one who is financially interested in a crop induces the landlord to part with his lien in order that the tenant might retain possession, and to sign an appeal bond of the tenant, and promises to save the landlord from harm thereon, and the landlord is required to and does pay the bond: *Held,* the release of the landlord's lien is sufficient consideration for the promise to save from harm, and the transaction does not fall within the provisions of C. S., 987, that a promise to pay the debt of another must be in writing.

2. **Appeal and Error—Review—Question Presented for Review or Necessary to Determination of Cause.**

Where the answer to one issue is determinative of the case on appeal independently of the other issues submitted, the Supreme Court will not ordinarily consider exceptions arising upon the trial of the other issues.

3. **Appeal and Error—Review—Burden of Showing Error.**

The verdict of the jury will not be disturbed on appeal when there is sufficient evidence to support it, in the absence of error of law in the trial.

APPEAL by defendant from *Barnhill, J.*, and a jury, at October Term, 1928, of NASH. No error.

The evidence on the part of plaintiff was to the effect that Henry Horne instituted a suit against G. T. Garner and B. G. Alford in a justice of the peace court, who rendered judgment against both.

W. P. Jennings testified in part that the defendant, Keel, "said a bond would have to be made for Garner, and I told him *I would not sign Garner's bond without I had his assurance and promise to protect me from cost or loss in the deal,* and Mr. Keel said it was unethical for a lawyer to sign his client's bond and insisted that I sign it with his promise to protect me. . . . *I signed the bond with Mr. Keel's assurance that he would save me from loss or cost.* (Judgment was rendered in the Superior Court in favor of Horne and against Garner and Jennings.) . . . I (Jennings) paid the bond. . . . I paid it under execution. . . . We had a meeting about taking over the Garner crop. Mr. Keel told me Garner owed him four or five hundred dollars. Garner was anxious to get his crop back, and I was anxious to turn it back to him, and the matter dragged along for a week or ten days. He said he would take up Garner's account and he got Garner and *had an agreement that he would give him one-half of the crop* over and above his debts if he would come between me and Garner and relieve him of the claim and delivery. It wasn't about the bond, but it was about the crop. We were in Mr. Keel's office, and before I released my claim for rent and surrendered collaterals he gave me the assurance that he would protect me against loss. . . . *Mr. Keel gave me the assurance to protect me against loss for the reason we were turning over collateral. . . . Upon that promise I surrendered my landlord's lien. . . . I didn't start out to furnish him supplies, but I finally did through Mr. Alford, and I became responsible for what he got from Alford.* Horne was a tenant on the farm under Garner, and some trouble arose between them and this resulted in a suit between Garner and Horne, my tenant and Garner's tenant. The trouble was about the crops on the farm. . . . I was responsible and the crops on the farm were responsible for what I *furnished. I had no writing about the bond, never had at any time had any writing.* . . . The crop was grown on my farm. I had the rent and the supplies to collect out of it. I don't remember the amount Garner owed. We have the notes. He owed a considerable amount. Mr. Keel has paid every dollar due on these notes." The amount of the notes was $2,670.37.

In the case instituted in the justice of the peace court, upon appeal to the Superior Court Horne obtained judgment against Garner and Jennings for $200, and he (Jennings) had to pay the bond of $200. No judgment on appeal was rendered against Alford. Plaintiff called upon defendant to reimburse him, and he said that he was not liable, and this action was instituted.

B. G. Alford testified in part: "Garner lived on Jenning's farm, was trading with me. Jennings was responsible for everything Garner and his tenants got. He was responsible for everything Horne got and Horne traded with me. Horne brought suit against Garner and I was made a party to the suit at the trial at the advice of Mr. Keel. I went to the trial as a witness as to the indebtedness of Horne and carried my books there. . . . All of the accounts that Garner and his tenants owed us were paid by notes signed by Mr. Keel, and it was then that I refused to surrender my security unless he protected me from loss on account of the suit. He made a verbal agreement. He did not include the amount of the bond in the notes—there were three notes amounting to around $2,500, and this included everything that Garner and his tenants owed us. This included rent, supplies and everything. The magistrate's suit had not been finally settled. Mr. Jennings handled the notes. I got my money. After these papers were signed we had no further interest in the crops—none at all."

The issues submitted to the jury and their answers thereto were as follows:

"1. Did the plaintiff sign the appeal bond in the case of Horne *v.* Garner upon the promise and agreement of the defendant that he would indemnify and save the plaintiff harmless against any loss or damage by reason thereof? Answer: Yes.

2. Did the plaintiff surrender his landlord's lien upon the crops of G. T. Garner to the defendant upon the promise and agreement of the defendant to indemnify and save the plaintiff harmless against any loss or damage by reason of his surety upon the appeal bond in the case of Horne *v.* Garner as alleged? Answer: Yes.

3. In what amount, if any, is the defendant indebted to the plaintiff? Answer: $200."

The other material facts and assignments of error will be set forth in the opinion.

Cooley & Bone for plaintiff.
Battle & Winslow for defendant.

CLARKSON, J. Plaintiff, W. P. Jennings, was the landlord, B. F. Alford was the supply merchant. G. T. Garner was Jenning's tenant. Henry Horne was a subtenant of Garner on Jennings' land. Horne sued Garner and Alford in a justice of the peace court for $200. The defendant Keel in this action was attorney for Garner in that suit. Judgment was rendered for Horne against both Garner and Alford. They appealed to the Superior Court. Plaintiff in this action signed Garner's appeal bond and testified, *"I signed the bond with Mr. Keel's assurance that he would save me from loss or cost."* In the Superior Court Horne obtained a judgment for $200 against Garner and his surety, Jennings, on the appeal bond. Jennings, who had to pay the judgment after execution was issued against him, now sues Keel on his promise. This promise was denied by Keel and he pleaded the statute of frauds, C. S., 987, as follows: "No action shall be brought whereby to charge an executor, administrator or collector upon a special promise to answer damages out of his own estate or to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized."

B. F. Alford is out of the picture; in the Superior Court he was released. The jury answered the first issue "Yes," which is as follows: "Did the plaintiff sign the appeal bond in the case of Horne *v.* Garner upon the promise and agreement of the defendant that he would indemnify and save the plaintiff harmless against any loss or damage by reason thereof?"

The interesting question so ably discussed by the attorneys on each side as to whether the above statute of frauds is applicable to the facts in this case, we do not think on this record it is necessary to decide.

The jury answered the second issue "Yes," which is as follows: "Did the plaintiff surrender his landlord lien upon the crops of G. T. Garner to the defendant upon the promise and agreement of the defendant to indemnify and save the plaintiff harmless against any loss or damage by reason of his surety upon the appeal bond in the case of Horne *v.* Garner as alleged?"

The jury also answered that defendant was indebted to plaintiff in the amount of $200.

On the evidence adduced by the defendant the jury could have readily answered the second issue "No," but did not do so, and answered it "Yes." This was entirely in their province.

The finding on the second issue in favor of plaintiff is sufficient to support the judgment. This Court will not ordinarily consider exceptions arising upon the trial of other issues "When one issue, decisive of appellant's rights to recover has been found against him by the jury." *Ginsberg v. Leach,* 111 N. C., 15; *Lilly v. Cooperage Co.,* 194 N. C., at p. 254.

Was the evidence of plaintiff sufficient to be submitted to the jury on the second issue, and did plaintiff under the evidence have a cause of action against defendant? We think so. From the verdict of the jury, we consider only the evidence adduced by plaintiff.

As to whether plaintiff signing the bond of Garner at the request of Keel was such an obligation as to support a promise under the second issue, speaking to the subject, we find the law thus stated in 9 Cyc., 345, that "The compromise of a disputed claim may uphold a promise, although the demand was unfounded." *Beck v. Wilkins-Ricks Co.,* 186 N. C., at p. 214.

The plaintiff, W. P. Jennings, was the landlord; Garner the tenant; Horne the subtenant; Alford the supply merchant. What were the rights of Jennings to the crops? C. S., 2355, is as follows: "When lands are rented or leased by agreement, written or oral, for agricultural purposes, or are cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, *any and all crops raised on said lands shall be deemed and held to be vested in possession of the lessor* or his assigns at all times, *until the rents for said lands are paid,* and until all the stipulations contained in the lease or agreement are performed, or damages in lieu thereof paid to the lessor or his assigns, and until said party or his assigns *is paid for all advancements made and expenses incurred in making and saving said crops.* A landlord to entitle himself to the benefit of the lien herein provided for, must conform as to the prices charged for the advance to the provisions of the article Agricultural Liens, in the chapter Liens. This lien shall be preferred to all other liens, and the lessor or his assigns is entitled, against the lessee or cropper, or the assigns of either, who removes the crop or any part thereof from the lands without the consent of the lessor or his assigns, or against any other person who may get possession of said crop or any part thereof, to the remedies given in an action upon a claim for the delivery of personal property." (Italics ours.)

It was in evidence on the part of plaintiff that he, Jennings, furnished Garner supplies through the time-merchant Alford and was responsible to Alford. Jennings under the law had a lien on all the crops raised on the land by Garner and his subtenant Horne. The crops raised on the land "shall be deemed and held to be vested in possession of the lessor," etc., until the "rents" and "all advancements" made and expenses incurred in making and saving the crops. There was a claim and delivery taken out against Garner in respect to the crop. At that time the appeal of Garner with Jennings as surety for $200, from the justice of the peace to Superior Court was pending. It was in evidence on the part of plaintiff that Garner, Jennings' tenant, owed the defendant, Keel, some four or five hundred dollars, and they had a meeting about the crop and the defendant Keel stated that he had an agreement with Garner to take up Garner's account and Garner was to give him one-half of the crops over and above his debts. The defendant Keel gave three notes to plaintiff totalling some $2,670.37, which were paid. At that time the liability of plaintiff as surety on the $200 appeal bond was contingent on the recovery of Horne in the Superior Court against Garner.

This was the situation of the parties. Of course the premise of this decision is based on plaintiff's evidence, which the jury accepted as true. Plaintiff testified: "Mr. Keel gave me the assurance to protect me against loss for the reason we were *turning over collateral.* Mr. Keel said it was unethical for him to sign papers. Fix it up and I will save both of you from loss. Mr. Alford heard this. *Upon that promise I surrendered my landlord's lien.*"

The law applicable to the facts in this action is laid down in *Whitehurst v. Hyman,* citing numerous authorities, 90 N. C., p. 489-90: "It is settled by many judicial decisions in construing this statute, and others substantially like it, that where there is some new and original consideration of benefit or harm moving between the party to whom the debt to be paid is due, and the party making the promise to pay the same, such case is not within the statute; *as where a promise to pay an existing debt is made in consideration of property placed by the debtor in the hands of the party promising, or where the party to whom the promise is made relinquishes a levy on the goods of the debtor for the benefit of the promisor, or where the party promising has a personal interest, benefit or advantage of his own to be subserved, without regard to the interests or advantage of the original debtor; as, for example, if a creditor has a lien on certain property of his debtor to the amount of his debt, and a third person who has an interest in the same property promises the creditor to pay the debt in consideration of the creditor's relinquishing his lien. Such promises are not within the statute, because they are not made 'to answer the debt, default or miscarriage of another person.'* It may be, the performance of the promise will have the effect of discharging the original debtor; but such discharge was not the inducement to, or the consideration to support the promise. The moving, controlling purpose of the promisor in such case is his own advantage, not that of the debtor. It not unfrequently happens that in a great variety of business circumstances it becomes important in a valuable sense to third parties to discharge the debt of a debtor, or relieve his property from liability to the creditor for the benefit of such third parties, without regard to the benefit, ease or advantage of the debtor. The advantage to the third party, the promisor, is a sufficient consideration to support a contract separate from, and independent of, the debt to be discharged." (Italics ours.) *Handle Co. v. Plumbing Co.,* 171 N. C., 495; *Mercantile Co. v. Bryant,* 186 N. C., 551.

For the reasons given, in the judgment below, there is

No error.

KATHERINE H. ETHEREDGE v. CLAUDE A. COCHRAN AND JAMES P. HARRIS, ADMINISTRATORS OF THE ESTATE OF C. LANE ETHEREDGE, DECEASED.

(Filed 27 February, 1929.)

Husband and Wife—Wife's Separate Estate—Rights and Liabilities of Husband—Gifts—Presumptions.

Under the change made in the law of married women's property rights by C. S., 2506, and Article X, sec. 6 of our Constitution, whereby a married woman is authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried, with certain restrictions as to her real estate, C. S., 2507, it is *Held,* where she receives checks from her parents as a personal gift to her which she endorses and delivers to her husband, there is a presumption that he receives the money in trust for her, and in the absence of evidence that it was a gift, she may recover the same in her action against him, or, after his death, against his personal representative.

APPEAL by defendants from *Harwood, Special Judge,* at October Special Term, 1928, of MECKLENBURG.

C. Lane Etheredge was the sole owner and proprietor of an unincorporated business which he conducted in the city of Charlotte under the name of the Etheredge Motor Sales Company. W. V. Hartman, of Pittsburgh, Pa., the plaintiff's father, gave her the sum of $45,000 in the three checks as follows: (1) A check for $10,000 dated 12 May, 1922; (2) a check for $15,000 dated 4 March, 1924, drawn by the Mellon National Bank of Pittsburgh on the National Bank of Commerce of New York, payable to the order of the plaintiff; (3) a check for $20,000 dated 11 February, 1924, drawn by the Mellon National Bank of Pittsburgh on the Bank of America, payable to the order of the plaintiff. All these checks were endorsed in due form by the plaintiff. C. Lane Etheredge died on 2 July, 1926, and on 7 July, 1926, the defendants qualified as administrators of his estate.

The plaintiff brought suit to recover of the defendants the sum of $45,000, the aggregate amount of the checks, alleging in substance that the intestate had received and had never accounted to the plaintiff for any part of this amount. The defendants answered, admitting that their intestate had received of the plaintiff $10,000 on 12 May, 1922, $20,000 on 14 February, 1924, and $15,000 on 7 March, 1924, and that no part of either sum was thereafter received by the plaintiff from the intestate or from the defendants. The defendants' motion for nonsuit was overruled and they excepted. Thereupon they tendered instructions to the effect that if a wife, having money in her possession which belongs to her, by her voluntary act transfers it to her husband, the law presumes the transfer to be a gift in the absence of evidence tending to show a loan; and that the burden of proving that the transaction was a loan was upon the plaintiff. These prayers were refused and the trial judge instructed the jury that if a wife, having funds in her possession, transfers the same to her husband there is a presumption, nothing else appearing, that the transaction is a loan and that the husband will undertake to repay it; and, further, that it is incumbent upon the husband who asserts it to show that the transfer is a gift.

It was admitted that the claim for $10,000 is barred and the jury returned a verdict for the plaintiff in the sum of $35,000. Judgment for plaintiff. Exception and appeal by defendants.

Whitlock, Dockery & Shaw for plaintiff.
F. A. McCleneghan and Taliaferro & Clarkson for defendants.

ADAMS, J. It is admitted that the plaintiff was the owner of the checks; that she duly endorsed them; that her husband collected them, and that the plaintiff has never been repaid. The question is whether the transfer of the wife's money to her husband raised the presumption of a loan or the presumption of a gift.

On this question judicial opinion is not unanimous, but the weight of authority and, we think, the better reasoning uphold the doctrine that where the separate property of the wife comes into the hands of her husband either from her directly or from another duly authorized to act for her there is no presumption that the transfer is a gift. The doctrine is clearly stated in *Stickney v. Stickney,* 131 U. S., 227, 33 Law Ed., 136, 143: "Whenever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of it to him." When, as with us, the property of a married woman is her sole and separate estate and is free from liability for the debts or obligations of her husband, the presumption is that it continues hers. *Grabill v. Moyer,* 45 Pa., 533. In *Bergey's Appeal,* 60 Pa., 408, 100 Am. Dec., 578, it was shown that the husband and wife were together when the wife was paid a sum of money out of her father's and her mother's estates; that the husband "picked up the money, counted it, and did not put it down again," but invested it in a farm. In reference to the question whether the transaction was a gift to the husband the Court said: "Not a word was spoken by the wife when her husband took up the money to count it, and put it in his pocket. Nor do we ever hear of a word thereafter to the effect that the wife had made a gift of it. No inference of a gift from the transaction as detailed could, we think, arise. She was not bound to attempt a rescue of it from him, or proclaim that it was not a gift. She might rest on the idea that his receipt, in her presence, was with the intent to take care of it for her." These two cases are cited with approval in *Stickney v. Stickney, supra;* and in *Parrett v. Palmer,* 8 Ind. Appeals, 356, 52 A. S. R., 479, a similar conclusion is based upon additional citations: "We have here a case where the wife's money passes directly and voluntarily from her hands to that of her husband, with no finding as to whether a gift was intended, or whether he received the money simply as an agent or trustee for her. Under such circumstances, what is the presumption of the law? It has long been conceded to be the law that a woman could bestow her separate property upon her husband by way of gift, unless prevented by some special limitation of her powers over it, but courts of equity view such transactions with care and caution, and in dread of undue influence: Story's Equity Jurisprudence, sec. 1395. 'There is no doubt that courts should narrowly scrutinize cases of alleged gifts from the wife to the husband.' *Hardy v. Van Harlingen,* 7 Ohio St., 208: 'As regards the *corpus* of the separate estate, no presumption arises in favor of a husband who has received it. He is prima facie a trustee for his wife, and a gift from her to him will not be inferred without clear evidence.' 2 Lewin on Trusts, 778: 'A simple payment by the wife to the husband of the income of her separate estate may be treated as a gift to him. . . . The receipt by him of separate capital moneys of the wife stands on a different footing. A transfer of her separate property into his name is prima facie no gift.' Crawley's Law of Husband and Wife, 268. So, also, in Eversley on Domestic Relations, 409: 'She may make a gift of her separate property to her husband for his own use, or that of the family, but the onus lies upon the husband of proving that a gift was intended, and that he has not influenced her act and conduct.' *Rich v. Cockell,* 9 Ves., 369; *Hughes v. Wells,* 9 Hare, 749; *Wales v. Newbould,* 9 Mich., 45; *Boyd v.*

De La Montagnie, 73 N. Y., 498; 29 Am. Rep., 197; Reeves on Domestic Relations (4 ed.), 216, note; *McNally v. Weld,* 30 Minn., 209; *Green v. Carlill,* 4 Ch. Div., 882; *Jones v. Davenport,* 44 N. J. Eq., 33; *Bergey's Appeal,* 60 Pa. St., 408; 100 Am. Dec., 578."

This we understand to be the prevailing rule where the wife holds her separate personal property as if a *feme sole.* It is provided by statute and by the Constitution that the real and personal property of any female in this State, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried. C. S., 2506; Constitution, Article X, sec. 6. It is further enacted that subject to the provisions of C. S., 2515, every married woman is authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried, but no conveyance of her real estate shall be valid unless made with the written assent of her husband as provided by section 6 of Article X of the Constitution, and her privy examination as to the execution of the same taken and certified as now required by law. C. S., 2507.

By virtue of these and other provisions the relation which married women formerly sustained to their husbands has been materially modified. Unity of person in the strict common-law sense no longer exists, and many of the common-law disabilities have been removed. Not only may they contract with each other; a married woman may now sue her husband in contract or in tort. *Dorsett v. Dorsett,* 183 N. C., 354; *Roberts v. Roberts,* 185 N. C., 566.

We apprehend that it was considerations of this kind that led the Court to remark in *Stickney v. Stickney, supra,* "There are decisions of courts of some of the other States, holding that a presumption arises of a gift from the wife to the husband of moneys placed by her in his hands, unless an express promise is made by him at the time that he will account to her for them or invest them for her benefit. But the decisions we have cited are more in accordance, we think, with the spirit and purpose of the Married Woman's Act, and only by conformity with them can it be fully carried out."

The reason for the rule is thus stated in *Parrett v. Palmer, supra:* "The trust and confidence ordinarily reposed by the wife in the husband; her natural reliance and dependence upon him for the management of her business; the fact that, as a rule, the husband is possessed of general business experience, while the experience of the wife is usually limited—

all these considerations sustain us in the conclusion that where the wife voluntarily delivers her money to the husband the law presumes that he takes it as trustee for her, and not as a gift, even though there be no express promise to repay."

The transaction raises not the presumption of a gift from the wife to the husband, but the presumption that he received and must account for the money. *Haymond v. Bledsoe,* 11 Ind. Appeals, 202, 54 A. S. R., 502; *Sykes v. City Savings Bank,* 115 Mich., 321, 60 A. S. R., 562; *King v. King,* 24 Ind. App., 598, 79 A. S. R., 287; *Comer v. Hayworth,* 30 Ind. App., 144, 96 A. S. R., 335, 13 R. C. L., 1371, sec. 416; 30 C. J., 680.

By some courts a distinction is drawn between receipt of the rents or income of the wife's estate and receipt of the *corpus* or principal. 13 R. C. L., 1387; *Estate of Hauer,* 140 Pa., 420, 23 A. S. R., 245. In considering the question before us it is necessary to keep in mind the further distinction between the husband's relation to his wife's property before and since the statutory "emancipation" of married women. Some of the cases cited in the appellant's brief must be read in the light of this distinction. In *Rea v. Rea,* 156 N. C., 529, the question was whether the wife's written transfer to her husband of shares of stock was subject to the provisions of C. S., 2515; and it was said that the section applies to contracts and not to gifts. None of these decisions is inconsistent with the conclusion we have reached. We find

No error.

S. H. ISLER v. H. H. BROWN, TRADING AS BROWN AUTO AND SUPPLY COMPANY.

(Filed 27 February, 1929.)

Chattel Mortgages—Removal or Transfer of Property by Mortgagor—Rights and Liabilities of Parties—Fraud.

Where the seller of an automobile since discharged in bankruptcy obtains from the State a certificate of clear title for the purchaser, and suppresses the fact that there was an existing registered chattel mortgage on the car, which the latter was later forced to pay: *Held,* the seller is liable in damages to the purchaser for the fraud practiced upon him.

APPEAL by defendant from *Daniels, J.,* and a jury, at October Term, 1928, of WAYNE. No error.

The plaintiff's evidence was to the effect that about 12 May, 1925, he purchased from the defendant a new Studebaker automobile, paying

$1,450 for same, some $1,100 cash and a Hudson car. At the time of the sale defendant met plaintiff at the Borden Building, in Goldsboro, N. C., where the State issues certificates and defendant got the certificate for plaintiff. In the certificate there was no statement of a lien on the car that he purchased from defendant. Plaintiff sent the certificate to the State Department and it sent him a title to the car. Defendant gave plaintiff the information on which the certificate of title was issued to him, but concealed the fact that there was a chattel mortgage on the car. Plaintiff paid for the car and relied on the representation and conduct of defendant that it was free and clear of encumbrances. In fact, there was a recorded chattel mortgage against the automobile at the time in the sum of $900, which the defendant himself had on 16 February, 1925, given to the First National Bank of Mount Olive, N. C., which was duly recorded. The plaintiff had no actual knowledge of this mortgage until the fall of 1927, when the bank instituted claim and delivery proceedings for the automobile and forced the plaintiff to pay $400, being the balance then due on the chattel mortgage. At that time the defendant was totally insolvent and had gone into bankruptcy.

The issues submitted to the jury in the Superior Court and their answers thereto, were as follows:

"1. In what amount, if any, is the defendant, H. H. Brown, indebted to the plaintiff by reason of breach of warranty of title? Answer (by consent): $400 with interest from 1 February, 1928.

2. Was the plaintiff induced to purchase said automobile by false and fraudulent representations as alleged in the complaint? Answer: Yes."

Kenneth C. Royall and J. Q. LeGrand for plaintiff.
J. Faison Thomson and E. A. Humphrey for defendant.

PER CURIAM. Fraud can be practiced by a *suppressio veri* or *suggestio falsi.* "It is a rule of equity, as well as of law, that a *suppressio veri* is equivalent to a *suggestio falsi;* and where either the suppression of the truth or the suggestion of what is false can be proved, in a fact material to the contract, the party injured may have relief against the contract." 18 Johns., 405; Black's Law Dict., p. 1040; *McNair v. Finance Co.,* 191 N. C., at p. 715. This is good law as well as good morals.

The court below charged clearly and fully the law of actionable fraud applicable to the facts in this case. We find

No error.

THE BOARD OF TRUSTEES OF HENDERSON GRADED SCHOOLS AND THE BOARD OF EDUCATION OF VANCE COUNTY v. CITY OF HENDERSON.

(Filed 6 March, 1929.)

1. **Municipal Corporations — Contracts and Franchises — Assignment or Surrender—Rights of Parties Under Surrender.**

Where under an ordinance in the nature of a contract a water corporation receives from a city a franchise upon condition that it furnish water free to the city for certain public purposes including the public schools not owned by the city, but under the control of trustees of its graded schools and the board of education of the county, and by agreement between the city and the water company the former takes over the property of the latter, and conducts the business: *Held*, in effect the transaction is a surrender of the franchise by the water company, and not an assignment, and the schools cannot claim the right from the city for a free water supply.

2. **Same—Notice and Rights of Parties Receiving Benefits Under Franchise Before Surrender.**

Where a city by ordinance contract imposes on a water company the requirement of furnishing water free to the graded schools operated therein, and the city thereafter acquires the plant by a surrender of the franchise: *Held*, under the facts of this case, fair dealing requires the city to give the school authorities reasonable notice of its intention to charge the schools for water furnished them, and the city may collect only for water furnished after such notice.

APPEAL by plaintiffs from *Midyette, J.*, at October Term, 1928, of VANCE. Modified and affirmed.

The parties waived a trial by jury and agreed that the judge should find the facts which should be as conclusive and binding upon all parties as if submitted to and found by a jury.

The material facts are as follows: The city of Henderson is a municipal corporation. The Henderson Water Company is a corporation created by the General Assembly. In 1901 the Henderson Township Graded School District was established. Private Laws 1901, ch. 91. In 1892 the defendant granted to the assignors of the Henderson Water Company a franchise for forty years to construct, maintain and operate a system of waterworks and to supply water for fire and other purposes. This franchise was conferred by an ordinance enacted by the defendant and was in the nature of a franchise contract. Afterwards it was accepted by the grantees as provided in section 18 of the ordinance. Section 9 contained this provision: "Water shall be furnished free of charge for churches, public schools, town offices, market-houses, for city use and all of the town offices now in use or to be erected."

The defendant purchased the Henderson Waterworks from the Henderson Water Company pursuant to a contract and a deed appearing in the record, but not under the ten-year period or by appraisal as provided in the franchise. The schools were not parties to the purchase by the city, but the purchase was made as a compromise of litigation between defendant and the Water Company. No election was ever held in the city of Henderson on the question of furnishing free water for the schools; and bonds in the sum of $390,000 were issued by the city of Henderson for the purchase of this property and improvements. The defendant keeps all money derived from the waterworks in a separate fund in compliance with C. S., 2809, and it is set aside for the improvement of the extension of the water system only. There are nine public schools in the Henderson School District, of which five are located within the corporate limits of the city and four outside the city. Some children outside the city attend the schools within the corporate limits. It was found further by the presiding judge that the defendant contracted with the Henderson Water Company for the purchase of its physical property as shown by the contract, and that the water company in pursuance of the contract delivered to the defendant a deed conveying certain real and personal property. The public schools within the city are not owned or operated by the defendant. As a conclusion of law his Honor held that the defendant is entitled to collect and recover of the plaintiffs for water used in the schools within the city in 1927, $898.49, and in 1928, $798.91, making a total of $1,697.40, with interest thereon as provided in the judgment, and adjudged that the restraining order be dissolved.

Judgment was rendered for the defendant and the plaintiffs excepted and appealed upon assigned errors, which are referred to in the opinion.

McCoin & Montague and Thomas M. Pittman for plaintiffs.
J. H. Bridgers, I. B. Watkins and Perry & Kittrell for defendant.

ADAMS, J. In 1892 the defendant enacted an ordinance granting to A. H. McNeal and others, their associates, successors and assigns, for a period of forty years an exclusive franchise to supply water to the inhabitants of the city for fire purposes and other public uses on prescribed terms. In section 9 of the ordinance it was stipulated that the grantors should furnish water free of charge to churches, public schools, and other designated institutions, "now in use or to be erected." In 1909 the Henderson Water Company, successor of these grantees, contested the validity of this provision on several grounds, but failed to maintain its position. See *Water Co. v. Trustees,* 151 N. C., 171. The Water

Company thereafter complied with its contract in this respect until, in pursuance of a written agreement made 24 June, 1926, it surrendered its franchise and sold its property to the defendant by a deed dated 12 July, 1926. The plaintiffs contend that by virtue of its contract with the defendant it is still bound to furnish the schools with water free of charge. In determining the controversy we are concerned, not with matters which are incidental, but with those only which are raised by the appellants' exceptions.

It is first contended that the limitation in the second finding of fact that the defendant contracted with the Water Company for the purchase of its physical property is inaccurate, because the contract includes property which is incorporeal. If this is true, how is it prejudicial to the plaintiffs? The franchise of 1892 was granted by the city and was expressly surrendered to the city under the contract and deed of 1926. With its franchise surrendered the Water Company could not exercise the "exclusive right and privilege" which the ordinance conferred, and it sold its property to the defendant "free from all claims, liens, encumbrances and liability whatsoever." The ordinance, which was contractual in its nature, was in effect repealed with the express consent of the Water Company, and is not enforceable by either party. 43 C. J., 563, sec. 888; *Wood v. Seattle,* 52 L. R. A., 869.

This conclusion necessarily disapproves the position that the defendant is still bound to the performance of the franchise-contract executed in 1892. The plaintiffs were not parties to that contract; and the parties themselves limited the duration of the franchise to the time during which the ordinance should be in force.

It is not denied that the franchise-contract was binding on the associates, successors, and assigns of the original grantees, and that its terms could be enforced so long as the contract itself continued, but the decision in *Water Company v. Trustees, supra,* does not profess to determine the rights either of the plaintiffs or of the parties after the surrender of the franchise and the defendant's purchase of the property. The Water Company's "surrender" of its franchise to the defendant was not synonymous with a transfer to its "associates, successors, and assigns." Such a construction is altogether inconsistent with the manifest purpose and spirit of the contract and the deed which were executed in 1926.

The use of the property described in these instruments and purchased by the defendant does not necessarily involve the continued use of the franchise which was surrendered, and which neither of the parties intended thereafter to exercise. *Wood v. Seattle, supra,* p. 391. The case of *Ormond v. Ins. Co.,* 145 N. C., 140, cited by the appellants, dealt with the question whether an insurance policy had been relinquished or surrendered to other beneficiaries. It is not authority for the position that the assignment or transfer of a franchise-contract to the grantee's associates, successors and assigns is synonymous with the surrender of the franchise to the body by which it was granted.

The principle that a third person, even though a stranger, may enforce a promise made for his benefit is not available to the plaintiff in a contract of this character by which the franchise is surrendered and the contract is terminated by consent of the parties.

In one respect, however, we think the judgment should be modified. As the defendant imposed upon the grantees of the franchise an obligation to furnish water to the schools free of charge, the plaintiffs may have permitted the use of the water by the schools on the assumption that the defendant, though not legally required to do so, would recognize the obligation. Conceding that the defendant was technically under no such obligation, we are of opinion that the ends of justice would more nearly be met by allowing a recovery only for such water as was furnished after notice was given of the defendant's purpose to make a charge. The amount adjudged to be due from August, 1926, to August, 1927, will therefore be stricken from the judgment and as thus modified the judgment will be affirmed.

Modified and affirmed.

R. W. PERRY v. KELFORD COCA-COLA BOTTLING COMPANY.

(Filed 6 March, 1929.)

1. **Food—Liability of Manufacturer for Injuries to Consumer—Deleterious and Foreign Substances—Evidence.**

   Where there is evidence in an action against a bottling company of deleterious substances in a bottled drink that caused injury to the plaintiff in drinking the contents, evidence that deleterious substances had been found in other drinks bottled by the same company, under substantially the same conditions, is admissible as corroborative evidence of the plaintiff's theory that the presence of glass in the bottle which he purchased was not an unforeseeable contingency.

2. **Damages — Punitive Damages — Grounds Therefor — Malice, Wanton Negligence, etc.—Evidence—Food.**

   Where there is no evidence that the injury caused the plaintiff by a deleterious substance in a bottled drink was caused maliciously or by wanton negligence or in a spirit of mischief or criminal indifference to civil obligations, punitive damages may not be recovered by him.

3. **Appeal and Error—Disposition of Cause—Modification and Affirmance.**
Where there is no error of law in the trial of the case in the lower court except on the separate issue of exemplary damages, the answer of the jury on this issue will be stricken out on appeal, and the judgment of the lower court as thus modified will be affirmed.

APPEAL by defendant from *Lyon, Emergency Judge,* at November Term, 1928, of HERTFORD.

Winston, Matthews & Kenny for appellant.

ADAMS, J. A former appeal in this case is reported, *ante,* 175. It was there held that the evidence objected to was competent. The defendant now insists that at the last trial additional evidence was offered and improperly excluded. True, one or two exceptions not appearing in the record of the former appeal are noted and brought forward in the appellant's brief, but all are to be determined by the application of one principle: evidence of the occurrence of similar events is probative on an issue as to whether a like occurrence happened at another time. "Evidence of similar occurrences is admitted where it appears that all the essential physical conditions on the two occasions were identical; for under such circumstances the observed uniformity of nature raises an inference that like causes will produce like results, even though there may be some dissimilarity of conditions in respect to a matter which cannot reasonably be expected to have affected the result." 22 C. J., 751, sec. 840; *Pritchett v. R. R.,* 157 N. C., 88; *Leathers v. Tobacco Co.,* 144 N. C., 330; *Dorsett v. Mfg. Co.,* 131 N. C., 254. Testimony as to the purchase of the bottle a few days before the trial was competent, if not as substantive evidence at least as corroborative of the plaintiff's theory that the presence of glass in the bottle which he purchased was not an unforeseeable contingency, but one of a series of similar occurrences preceding and following the date of the alleged injury.

Exceptions were entered to the court's refusal to dismiss the action and to give certain of the defendant's prayers for instructions; but as to these an inspection of the record fails to disclose any reversible error, except in reference to punitive damages.

On the cross-examination A. C. Johnson, general manager of the defendant company, testified: "I say that no complaint of any foreign substances being in bottles has been made to me direct, except through my truck drivers, and I have had several complaints made through them. No, I made no investigation as result of what the drivers told me because I knew it was impossible for foreign substances to get in the bottles." He had previously said, "Never before this time during our whole operations has any complaint been made to me of any foreign substance being in a bottle. This is the first called to my attention. I have heard the boys on the truck say they had."

The trial judge declined the defendant's prayer that punitive damages could not be awarded, and gave the jury this instruction: "Punitive damage is not a matter of right, but a matter of discretion of the jury. If you find that the defendant was carelessly negligent, that he was wantonly negligent, and even wilfully did the acts complained of, I say you may find that, and you may still say whether you allow damages or not, you may allow damages as a punishment to him, as an example to others, but you are not compelled to do so."

In *Tripp v. Tobacco Co.,* 193 N. C., 614, many of the authorities relating to punitive damages are reviewed and the following conclusion announced: "Punitive, vindictive or exemplary damages, sometimes called smart money, are allowed in cases where the injury is inflicted in a malicious, wanton and reckless manner. The defendant's conduct must have been actually malicious or wanton, displaying a spirit of mischief towards the plaintiff, or of reckless and criminal indifference to his rights."

This is in accord with previous decisions, among them the cited case of *Holmes v. R. R.,* 94 N. C., 318: "Punitive damages are never awarded except in cases 'when there is an element either of fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness, or other causes of aggravation in the act or omission causing the injury.' "

The record does not disclose such a "spirit of mischief or of criminal indifference to civil obligations" as would entitle the plaintiff to an award of punitive damages. *Picklesimer v. R. R.,* 194 N. C., 40.

The fourth and fifth issues should not have been submitted to the jury. They will therefore be stricken from the judgment, the plaintiff being entitled only to compensatory damages. As thus modified the judgment is affirmed.

Modified and affirmed.

STATE v. MARK HARGETT.

(Filed 6 March, 1929.)

1. Criminal Law—Trial—Verdict.

It is the duty of the trial judge to see that the verdict of the jury is correctly received by the court, and where in a criminal action the jury has come back into court with their verdict and upon the announcement of a certain verdict by the foreman several of the jurors have contradicted it as the one agreed upon, it is correct for the court, before finally accepting it and before it is recorded, to have the jury again retire, and upon their reaching a different verdict to accept it and have it recorded as the verdict in the case.

2. **Criminal Law—Motion in Arrest of Judgment for Irregularities in Rendition of Verdict.**

Where in a criminal action the judge has properly accepted as final a verdict of the jury returned after a retirement for a second time, the defendant may not acquiesce in this course and then object to a judgment under the later and more severe verdict, and his motion in arrest of judgment on that ground will be denied.

APPEAL by defendant from *Nunn, J.*, at December Term, 1928, of GREENE. No error.

Indictment for burglary. Verdict: Guilty of breaking into or entering the dwelling-house of another otherwise than burglariously, with intent to commit a felony therein. C. S., 4235.

From judgment on the verdict that defendant be confined in the State's prison for the term of ten years, defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. Paul Frizzelle for defendant.

CONNOR, J. On his appeal to this Court defendant has abandoned his assignment of error based on his exception to the refusal of the trial court to allow his motion for judgment as of nonsuit. C. S., 4643. After taking said exception, defendant offered evidence in support of his defense. He did not renew his motion at the close of all the evidence. The exception was therefore waived, and in no event could it have been considered by this Court. *S. v. Helms,* 181 N. C., 566, 107 S. E., 228.

The evidence was properly submitted to the jury. It tended to show that during the night of 11 August, 1928, the defendant entered the dwelling-house of Mark Edwards, in Greene County, through a window opening into the dining-room. He raised the window for this purpose. After entering the house, he went into the room in which the fourteen-year-old daughter of Mark Edwards was sleeping on a pallet. She was awakened by defendant and screamed. She struck defendant in the face, and then ran into the room in which her mother was sleeping. Defendant then ran into the kitchen, and thence made his escape. He was apprehended the next day, and when taken into the presence of the girl was identified by her as the man who had entered the house. She had known the defendant for several weeks, and had seen him a few days before he entered the house, when her father had a business transaction with him.

There was no exception to instructions given by the court in the charge to the jury. The defense was an alibi. The court instructed the jury that under the indictment upon which defendant was being tried, they could return one of four verdicts: (1) Guilty of burglary in the first degree; (2) guilty of breaking into or entering the dwelling-house of another otherwise than burglariously with intent to commit a felony therein; (3) guilty of an attempt to commit the crime of larceny; or (4) not guilty. C. S., 4640. *S. v. Robinson,* 188 N. C., 784, 125 S. E., 617; *S. v. Williams,* 185 N. C., 685, 116 S. E., 736.

After the jury had retired to their room and considered the case for some time, they indicated to the court that they were ready to return their verdict. When they came into the court room, they announced that they had agreed upon a verdict. In response to the court's inquiry, their foreman stated that the jury found defendant guilty of an attempt to commit the crime of larceny. The court directed the clerk to enter this as the verdict, but before the clerk had entered the verdict, the court was informed by several of the jurors that their foreman had not returned the verdict as agreed upon by the jurors. The court thereupon instructed the clerk not to enter the verdict, and after repeating his instructions to the jury with respect to the verdict which they could return, under the indictment, directed the jury to retire and again consider the case. When the jury returned into the court room a second time, they rendered the verdict, which was accepted by the court and recorded by the clerk.

Upon the return of the verdict, to wit: "Guilty of breaking into or entering the dwelling-house of another otherwise than burglariously with intent to commit a felony therein," the defendant moved in arrest of judgment for that the jury had returned a verdict of "Guilty of an attempt to commit the crime of larceny," and that said verdict had been received by the court, and the clerk had been directed to enter the same as the verdict of the jury. The motion was overruled, and defendant excepted. The only assignment of error, other than that based upon an exception to the judgment, is based upon this exception. It cannot be sustained.

It has been held by this Court that a verdict of "Not Guilty" rendered by a jury properly sworn and empaneled, to try a criminal action, cannot be set aside or materially altered by the trial judge, to the prejudice of the defendant, after the same has been finally received by the court and duly recorded by the clerk. *S. v. Craig,* 176 N. C., 740, 97 S. E., 400. This principle, however, has no application to the instant case, upon the facts found by the judge and set out in the record. The verdict first tendered by the foreman of the jury was not finally accepted by the court or recorded by the clerk. Upon being informed by the jurors or some of them, that their foreman was in error, and that the verdict as returned by him was not the verdict agreed upon by the jury, the court properly declined to accept the same. There was no error in directing the jury to return to their room and to further consider the case. *S. v. Whittle,* 195 N. C., 618, 143 S. E., 1. Defendant did not except to this action on the part of the court, but took his chances upon a more favorable verdict. He cannot justly complain because the verdict as finally received and recorded was less favorable than the verdict first tendered, and which the court found was not the verdict of the jury. It was manifestly the duty of the court to see that the verdict recorded was the verdict of the jury in the case. There was no error in the refusal of the court to allow the motion in arrest of the judgment. The judgment is affirmed. It is supported by the verdict, returned by the jury and finally accepted by the court, and recorded by the clerk.

No error.

JESSIE W. MURRAY, ADMINISTRATRIX, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 6 March, 1929.)

Master and Servant—Master's Liability for Injuries to Servant—Federal Employer's Liability Act—Limitation of Action—Railroads.

The Federal Employer's Liability Act does not allow an action for damages for a wrongful death to be brought after two years from the date of the death complained of, and where suit has been commenced and nonsuit entered, it does not have the effect of extending the time in which the same action may be brought under the Federal Statute.

APPEAL by plaintiff from *Nunn, J.,* at November Term, 1928, of CRAVEN.

Civil action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect or default of the defendant.

It appears from the face of the complaint that the wrongful death complained of occurred on 21 January, 1921; that George L. Wimberly, Jr., first qualified as administrator of the estate of the deceased and began an action in the Superior Court of Nash County on 20 January, 1922, under the Federal Employers' Liability Act, for the same cause of action, as herein alleged, and against the same defendant; that thereafter on 26 September, 1927, said action was dismissed, as in case of nonsuit, upon certificate from the Supreme Court of the United States to the Supreme Court of North Carolina duly certified to the

Superior Court of Nash County *(Wimberly v. R. R.,* 190 N. C., 444, and 273 U. S., 673); and that the present action was instituted 18 August, 1928, and is likewise sought to be maintained under the Federal Employers' Liability Act.

A demurrer was interposed by the defendant upon the ground that the cause of action alleged in the complaint did not accrue within two years next preceding the institution of the action.

From a judgment sustaining the demurrer the plaintiff appeals, assigning error.

Ward & Ward and H. P. Whitehurst for plaintiff.
Moore & Dunn for defendant.

STACY, C. J., after stating the case: The demurrer was properly sustained on authority of *Belch v. R. R.,* 176 N. C., 22, 96 S. E., 640. Section 6 of the Federal Employers' Liability Act provides, among other things, "That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued," etc. There is no provision in this statute for extending the time within which suit may be brought by reason of a pending or former action and nonsuit suffered or entered therein. See, also, *Capps v. R. R.,* 183 N. C., 181, 111 S. E., 533.

Affirmed.

F. BLACKER v. E. M. BULLARD.

(Filed 6 March, 1929.)

1. **Justices of the Peace—Procedure in Civil Cases—Rendition of Judgment.**

   A justice of the peace who takes the case before him under advisement and later renders judgment must notify the parties thereof to afford them opportunity to appeal in accordance with the provisions of the statute. C. S., 661, 1530.

2. **Justices of the Peace—Review of Proceedings—Recordari.**

   Where a justice of the peace has taken a case under advisement and later renders judgment without notice to the defendant, the party against whom judgment is rendered, and the defendant does all that the law requires of him, after he had notice of the justice's judgment, to perfect his appeal to the Superior Court within the time required by statute, C. S., 661, 1530, and later has *recordari* issued from the latter court, the judgment appealed from will not be held as final.

APPEAL by plaintiff from *Clement, J.,* at June Term, 1928, of RICHMOND.

Civil action to recover $34.50, the value of merchandise alleged to have been sold and delivered to the defendant by plaintiff.

From a verdict and judgment in favor of defendant, the plaintiff appeals, assigning errors.

W. R. Jones for plaintiff.
J. C. Sedberry for defendant.

STACY, C. J. Judgment for the plaintiff was entered in the court of a justice of the peace, but this was reversed when brought up on *recordari* and tried in the Superior Court, the jury having rendered a verdict for the defendant.

The only question presented is whether the judgment of the justice of the peace became final upon the defendant's failure to bring his appeal to the next ensuing term of the Superior Court. C. S., 661, and 1530. But his Honor finds that the defendant was misled by the justice of the peace, and that he did all that the law required of him after he had notice of the justice's judgment. In this we discover no error.

A justice of the peace is not obliged to render judgment at the conclusion of the hearing of a case, but he may take the same under advisement. *Reeves v. Davis,* 80 N. C., 209. When this is done, and judgment subsequently rendered, he should notify the parties of its rendition. *Osborne v. Furniture Co.,* 121 N. C., 364, 28 S. E., 362.

There is no reversible error appearing on the record, hence the verdict and judgment will be upheld.

No error.

EUGENIA M. SAWYER, MOTHER AND NEXT FRIEND OF IRIS C. LAND, AND S. B. SEYMOUR, REGISTER OF DEEDS OF CAMDEN COUNTY, v. ALVAH FLOYD SLACK.

(Filed 6 March, 1929.)

1. **Marriage—Annulment—Jurisdiction of Suit for Annulment.**

The courts of this State have jurisdiction of a suit to annul a marriage performed here, although the plaintiff was a nonresident of this State at the time of the commencement of the suit. C. S., 1658.

2. **Same—Annulment in Nature of Divorce.**

A suit to annul a marriage for statutory reasons is in the nature of an action for divorce, with the same procedure except that the affidavit setting forth the jurisdictional facts is not required.

3. **Marriage—Validity—Marriage of Female Between the Ages of Fourteen and Sixteen.**

The marriage of a female between the ages of fourteen and sixteen without the written consent of her parent and without the special license required by chapter 75, Public Laws 1923, amending C. S., 2494, is not void but voidable.

4. **Marriage—Annulment—Marriage of Female Between the Ages of Fourteen and Sixteen—Persons Who May Bring Suit for Annulment.**

Where the register of deeds has been induced by fraudulent representations to issue a licence for the marriage of a female between the ages of fourteen and sixteen without conforming with chapter 75, Public Laws 1923, as to the written consent of her parent, the marriage is voidable only at the suit of the female, and neither the parent nor the register of deeds may maintain a suit to declare the marriage void, though the latter may at most maintain an action to revoke and cancel the licence issued by him before the solemnization of the marriage. C. S., 1658.

5. **Same—Construction of Statutes.**

C. S., 2494, as amended by chapter 75, Public Laws 1923, does not expressly declare a marriage void when the licence is issued upon fraudulent representations for the marriage of a female between the ages of fourteen and sixteen without the written consent of her parent, and the courts will not so construe it by implication.

CLARKSON, J., dissenting.

APPEAL by plaintiffs from *Small, J.*, at September Term, 1928, of CAMDEN. Affirmed.

This action was begun in the Superior Court of Camden County on 15 February, 1928.

Plaintiffs pray judgment that the marriage of the plaintiff, Iris C. Land, and the defendant, Alvah Floyd Slack, duly solemnized in accordance with the requirements of C. S., 2493, in Camden County, North Carolina, on 9 December, 1927, be declared null and void. Both said plaintiff and said defendant are citizens of the State of Virginia.

It is alleged in the complaint that at the date of said marriage the said Iris C. Land was a female person under the age of sixteen and over the age of fourteen, and that the license for said marriage was issued by the register of deeds of Camden County without the consent, in writing, of her parents, or either of them, as required by C. S., 2494, as amended by chapter 75, Public Laws 1923.

It is further alleged in the complaint that the issuance of said license was procured by false and fraudulent representations made by defendant to the said register of deeds, with respect to the age of the said Iris C. Land. The representations, alleged to be false and fraudulent, are set out in the complaint, fully and in detail.

Defendant filed a demurrer to the complaint, for that the facts stated therein are not sufficient to constitute a cause of action, in that it appears on the face of the complaint that at the date of said marriage the plaintiff, Iris C. Land, was more than fourteen years of age. The demurrer was sustained.

From judgment dismissing the action plaintiffs appealed to the Supreme Court.

W. I. Halstead for plaintiffs.
W. H. Starkey and Ehringhaus & Hall for defendant.

CONNOR, J. The Superior Court of this State is authorized by statute to declare a marriage void, *ab initio,* and, therefore, a nullity from its inception. Either party to a marriage may maintain an action for judgment to this effect, when the marriage was contracted contrary to statutory prohibitions, or where the marriage is expressly declared void by statute, for reasons set out therein. C. S., 1658. An action to annul a marriage for statutory reasons is in the nature of an action for divorce. After such action is begun in the Superior Court, the procedure therein is the same as in an action for divorce. The affidavit setting out the jurisdictional facts required for an action for divorce, C. S., 1661, is not required, however, for an action to annul a marriage upon statutory grounds. *Taylor v. White,* 160 N. C., 38, 75 S. E., 941. The Superior Court has jurisdiction of an action to annul a marriage contracted in this State, notwithstanding the fact that the plaintiff therein is not a resident of this State at the date on which the action was begun. It must, therefore, be held that the Superior Court of Camden County had jurisdiction of this action, although it appears upon the face of the complaint, and exhibits attached thereto, that plaintiff, Iris C. Land, is not a resident of the State of North Carolina, and that the action was begun within less than six months after the marriage had been solemnized.

A marriage void *ab initio* is a nullity from its inception; neither the parties thereto, nor other persons, whose social status or whose property rights are, or may be dependent upon its validity, acquire any rights, social or otherwise, by reason of such marriage. A void marriage imposes no duties or obligations upon either of the parties thereto, with respect to each other, or with respect to others. The courts are, therefore, loath to declare a marriage duly solemnized in accordance with statutory requirements, and therefore valid, at least prima facie, null and void, because the parties thereto, or either of them, were not expressly authorized by statute to marry, at the time the marriage was solemnized, but could have lawfully married at a subsequent date. It has therefore been held by this Court, to avoid the consequences of declaring a marriage void *ab initio,* that even where the statute declares a marriage void, because one of the parties thereto was under the age at which he or she might lawfully marry, the word "void," used in the statute, will be construed to mean "voidable," thus rendering the marriage valid until it has been declared void by a court of competent jurisdiction in an action directly attacking the validity of the marriage. *Watters v. Watters,* 168 N. C., 411, 84 S. E., 703. It has been held by this Court that a marriage which is not void, *ab initio,* but merely voidable, because one of the parties thereto was at its date under the age at which he or she might lawfully marry, may be ratified by the subsequent conduct of the parties in recognition of the marriage. *S. v. Parker,* 106 N. C., 711, 11 S. E., 517; *Koonce v. Wallace,* 52 N. C., 194. Whether or not an action to annul a marriage, voidable because one of the parties thereto was under the age at which he or she might lawfully marry, can be maintained prior to the date on which such party arrives at such age, does not seem to have been presented to this Court for decision. It has been held, however, that the marriage of a female under the age of fourteen, contracted when the statute provided that a female over fourteen might lawfully marry, was voidable only, and that such marriage was valid, where such female continued to live with her husband after she had arrived at the age of fourteen. The contract upon which the marriage status rested was thereby ratified. A subsequent marriage, during the life of the husband, was held bigamous. *S. v. Parker, supra.* The wife, who was under the age of fourteen at the date of her marriage, but who lived with her husband, after she arrived at such age, until his death, was held to be entitled to letters of administration upon his estate. *Koonce v. Wallace, supra.*

By virtue of the provisions of C. S., 2494, prior to its amendment by chapter 75, Public Laws 1923, an unmarried female over the age of fourteen years, might lawfully marry, in this State. If she was under the age of fourteen, at the date of her marriage, the marriage was not void; it was, at most, voidable. The effect of the amendment to said statute was to raise the age at which an unmarried female may lawfully marry from fourteen to sixteen, but it is expressly provided therein that she may marry, although under sixteen, if over fourteen years of age, provided a special license as therein required is procured. It has, however, been uniformly held by this Court that a marriage, without a license as required by statute, is valid. *Wooley v. Bruton,* 184 N. C., 438, 114 S. E., 628; *Maggett v. Roberts,* 112 N. C., 71, 16 S. E., 919. It must, therefore, be held that notwithstanding the provisions of chapter 75, Public Laws 1923, amending C. S., 2494, the marriage of an unmarried female over fourteen years of age, although solemnized without a valid special license as required by said chapter, is valid. Such marriage cannot be declared voidable, and certainly not void, and therefore a nullity, solely because such female was under the age of sixteen, at the date of the marriage. There is no provision of C. S., 2494, expressly declaring the marriage of a female under the age of sixteen, void or even voidable. It cannot be held that there is an implied declaration to that effect, C. S., 2495, by which it is declared that a marriage between a female person under fourteen years of age and any male is void, has not been amended. This statute is still in full force and effect. It must be construed in connection with C. S., 2494, as amended.

There was no error in holding that the facts stated in the complaint, and admitted by the demurrer, are not sufficient to constitute a cause of action for the annulment of the marriage of the plaintiff, Iris C. Land, and the defendant, Alvah Floyd Stack, on the ground that the plaintiff, Iris C. Land, at the date of the marriage, was under the age of sixteen years. She was over fourteen years of age. The fact that the license for said marriage was not in compliance with the statute does not affect its validity.

A register of deeds who has issued a license for a marriage, which is for any reason prohibited by statute, cannot maintain an action to have the marriage, which has been duly solemnized on the faith of such license, declared null and void. Nor can a parent maintain such action. At most, the register of deeds might maintain an action to have the license revoked and canceled, prior to the solemnization of the marriage in accordance with statutory requirements.

There was no error in dismissing the action. The judgment is
Affirmed.

CLARKSON, J., dissenting: C. S., 2494, reads as follows: "All unmarried male persons of sixteen years, or upwards, of age, and all unmarried females of fourteen years, or upwards, of age, may lawfully marry, except as hereinafter forbidden."

C. S., 2495: "All marriages between a white person and a Negro or Indian, or between a white person and person of Negro or Indian descent to the third generation, inclusive, or between a Cherokee Indian of Robeson County and a Negro, or between a Cherokee Indian of Robeson County and a person of Negro descent to the third generation, inclusive, or between any two persons nearer of kin than first cousins, or between a male person under sixteen years of age and any female, or between a female person under fourteen years of age and any male, or between persons either of whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or is incapable of contracting from want of will or understanding, shall be void: *Provided,* double first cousins may not marry; and *provided further,* that no marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except for that one of the parties was a white person and the other a Negro or Indian, or of Negro or Indian descent to the third generation, inclusive, and for bigamy."

C. S., 2496. "When the degree of kinship is estimated with a view to ascertain the right of kinspeople to marry, the half-blood shall be counted as the whole-blood: *Provided,* that nothing herein contained shall be so construed as to invalidate any marriage heretofore contracted in case where by counting the half-blood as the whole-blood the persons contracting such marriage would be nearer of kin than first cousins; but in every such case the kinship shall be ascertained by counting relations of the half-blood as being only half so near kin as those of the same degree of the whole-blood."

C. S., 2497: "Persons, both or one of whom were formerly slaves, who have complied with the provisions of section five, chapter forty, of the acts of the General Assembly, ratified March tenth, one thousand eight hundred and sixty-six, shall be deemed to have been lawfully married."

The above statutes were in force in this State for many years. The General Assembly of North Carolina, chapter 75, Public Laws 1923, changed the existing law and passed the following act:

"An act to prevent the marriage of females under sixteen years of age, except by consent of parents or persons standing in relation of a parent and upon special license.

"*The General Assembly of North Carolina do enact:*

"SECTION 1. That the word 'fourteen' in line two of section two thousand four hundred and ninety-four of the Consolidated Statutes be stricken out and the word 'sixteen' be inserted in lieu thereof; and that at the end of said section there be added the words: '*Provided,* that females over fourteen years of age and under sixteen years of age may marry under a special license to be issued by the register of deeds, which said special license shall only be issued after there shall have been filed with the register of deeds a written consent to such marriage, signed by one of the parents of the female or signed by that person standing in *loco parentis* to such female, and the fact of the filing of such written consent shall be set out in said special license."

C. S., 4209, reads as follows: "If any person shall unlawfully carnally know or abuse any female child over twelve and under fourteen years old, who has never before had sexual intercourse with any person, he shall be guilty of a felony and shall be fined and imprisoned in the State's prison, in the discretion of the court."

At the same session of the Legislature this statute, which had been in force for many years, was changed as follows: Chapter 140, Public Laws 1923:

"An act to amend section 4209 of the Consolidated Statutes.

"*The General Assembly of North Carolina do enact:*

SECTION 1. That section four thousand two hundred and nine of the Consolidated Statutes be and the same is hereby amended so as hereafter to read as follows:

" 'If any male person shall carnally know or abuse any female child, over twelve and under sixteen years of age, who has never before had sexual intercourse with any person, he shall be guilty of a felony and shall be fined or imprisoned in the discretion of the court; and any female person who shall carnally know any male child under the age of sixteen years shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court: *Provided,* that if the offenders shall be married or shall thereafter marry, such marriage shall be a bar to further prosecution.'

"SEC. 2. That all persons charged with a violation of this act under the age of sixteen years shall be subject to the jurisdiction of the juvenile court and such other courts as may hereafter exercise such jurisdiction, and shall be classed as delinquents and not as felons: *Provided,* that where the offenders agree to marry, the consent of the parent shall not be necessary: *Provided further,* that any male person convicted of the violation of this act, who is under eighteen (18) years of age, shall be guilty of a misdemeanor only."

The General Assembly of 1923, to protect the chastity and purity of the young, thoughtless female child from the insinuating arts of the seducer, the age of consent was raised from 14 to 16, and at the same session of the General Assembly the above statute was passed to prevent hasty marriages. It is a matter of common knowledge that the good women had battled before the General Assembly for long years to have the "age of consent" raised from 14 to 16 years.

The caption, or title, of the above act now being considered, is *"An act to prevent the marriage of females under sixteen years of age except by consent of parents,"* etc., and this consent must be in writing.

It is admitted on the record that this consent was never given by the parent—the mother in this case. The license, it is admitted, was procured by false and fraudulent representations on the part of defendant, as follows: "The defendant, Alvah Floyd Slack, on 9 December, 1927, induced the said infant, Iris C. Land, to leave the home of her mother and accompany him, together with one Ruth Sumners, to the office of the said S. B. Seymour, register of deeds at Camden Courthouse, Camden County, where the said defendant and said Ruth Sumners, a woman 23 years of age, applied to the said register of deeds for marriage license, where and when the defendant, with trickery, wilfully, fraudulently and unlawfully procured the said Ruth Sumners to assume the name of the infant, Iris C. Land, and that by such deceptive methods surreptitiously, fraudulently, knowingly, intentionally and unlawfully procured the issue of a marriage license to the defendant and the said infant, Iris C. Land, at that time being only fifteen years of age and being very small of size, who was present in some part of the office at the time of the issuance of said license, but took no part in the application for said license, which license was issued without any consent or permission from the parents or those who stood in *loco parentis* to the said Iris C. Land, and that no such consent or permission was written or authorized to be written on the face of the license as provided by law in making such marriage valid, of parties between the ages of fourteen and sixteen. . . . The said Ruth Sumners representing to the said register of deeds, that her name was Iris C. Land, and that she was the party entering into marriage with the defendant, and the defendant and the said Iris C. Land, accompanied by the said Ruth Sumners, took said license to a minister in Camden County, where and when a marriage ceremony was performed."

The mother immediately when the marriage was discovered rescued her female child and brings this action to nullify the marriage. The question is not presented on the record of the female child living with defendant after she becomes 16 years of age and ratifying the transaction, but the mother, who had the right to give or refuse written consent as next of friend, brings this action to nullify the unlawful marriage before she becomes 16 years of age. The written consent of the parent was a condition precedent to a lawful marriage and this was never given.

The intent of the act of 1923 should be the polar star to guide, and construing this act with the prior acts in *pari materia,* I think this action can be maintained. To my mind if this action cannot be maintained, the useful purpose of the act of 1923 is practically destroyed. I think there was error in dismissing the action.

WACHOVIA BANK AND TRUST COMPANY, ADMINISTRATOR OF W. R. MANN, v. NASH COUNTY AND J. T. TAYLOR, TREASURER OF NASH COUNTY.

(Filed 6 March, 1929.)

1. **Taxation—Liability of Persons and Property—Property Exempt—State Bonds—Power to Exempt.**

A statutory exemption from taxation of bonds authorized by statute and issued by the State is a valid exercise of legislative authority.

2. **Same—Government Bonds.**

The United States Government may issue its nontaxable bonds in pursuance of its governmental functions, and on the principle that agencies of the Federal Government are not subject to taxation by the State they are not subject to taxation, and it is not necessary that Congress in issuing such bonds secure this immunity by an express declaration to that effect, and this result is not in violation of the provision of the State Constitution requiring that all moneys, credits, investments in bonds be taxed by a uniform rule.

3. Same—Exchange of Securities to Avoid Taxation.

The statute which makes it a misdemeanor punishable by fine or imprisonment for "any person to evade the payment of taxes by surrendering or exchanging certificates of deposit in any bank of this State or elsewhere for nontaxpaying securities" does not apply to the purchase before the tax listing date of nontaxable United States or State bonds by funds subject to taxation, and thereafter selling the bonds and redepositing the amount, when the transaction is made in good faith and the bonds are bought and sold on the open market and the title thereto passes absolutely in both transactions, and the purchaser of the bonds may not be taxed on the purchase price.

4. Same.

The purchasing of nontaxable government bonds before the date for the listing of property for taxation, and the later selling of the bonds, does not withdraw the money used in the original purchase from taxation, since the purchase price is subject to taxation.

CLARKSON, J., concurring, STACY, C. J., concurring in concurring opinion.

APPEAL by defendants from *Barnhill, J.,* at October Special Term, 1928, of NASH. Affirmed.

Action to recover sums of money paid by plaintiff, under protest, upon demand of defendant, Nash County, in discharge of taxes illegally assessed by said defendant against plaintiff's intestate.

Upon plaintiff's motion for judgment on the pleadings, judgment was rendered as follows:

"This cause comes on for hearing at this the October, 1928, Special Term of the Superior Court of Nash County, with M. V. Barnhill, judge presiding, upon motion of plaintiff for judgment on the pleadings.

From the admissions in the pleadings and those made in open court by counsel for plaintiff and defendants, the court finds the following facts:

1. That on 27 April, 1925, plaintiff purchased, on the open market, $55,000 worth of United States Government Tax Exempt Bonds, paying for said bonds with a check against his account in the Planters National Bank of Rocky Mount.

2. That on 5 May, 1925, plaintiff sold said bonds, on the open market, and at a different price from that at which they were purchased, and deposited the proceeds of such sale to the credit of his account in the Planters National Bank of Rocky Mount.

3. That on 26 April, 1926, plaintiff purchased, on the open market, $39,500 worth of United States Government Tax Exempt Bonds, paying for said bonds with a check against his account in the Planters National Bank of Rocky Mount.

4. That on 8 May, 1926, plaintiff sold said bonds, on the open market, and at a different price from that at which they were purchased, and deposited the proceeds of such sale to the credit of his account in the Planters National Bank of Rocky Mount.

5. That both of these transactions were bona fide, plaintiff actually becoming the owner and in possession of said bonds and had them in his possession on 1 May, 1925, and 1 May, 1926, respectively. That the money representing the purchase prices of said bonds did not belong to nor was it in the possession of plaintiff on 1 May, 1925, and 1 May, 1926.

6. That plaintiff purchased said bonds in 1925 and 1926, for the purpose of escaping taxation on said $55,000 and said $39,500, respectively.

7. That the defendants demanded that plaintiff pay tax on said sums and, in compliance with said demand, plaintiff did, on 26 November, 1927, pay such tax, aggregating $2,543; but that said tax was paid under protest, in compliance with statute, and demand was duly made, in compliance with statute, that it be refunded. That this action was duly commenced to recover said sum.

The court being of the opinion that the above transactions do not constitute an exchange of certificates of deposit in a bank in this State for nontaxpaying securities, and do not constitute a surrender of taxable property for nontaxable property, which securities or nontaxable property was given up or surrendered after the date of listing property and said security or taxable property received back:

It is, therefore, ordered and adjudged that plaintiff recover of defendants the sum of $2,543, with interest thereon from 26 November, 1927, till paid, the costs of this action to be taxed by the clerk against the defendants."

Defendants excepted to the foregoing judgment and appealed therefrom to the Supreme Court.

Spruill & Spruill for plaintiff.
J. P. Bunn and Cooley & Bone for defendants.

CONNOR, J. Both the Government of the United States and the Government of the State of North Carolina have adopted the policy with reference to their financial operations which is generally pursued by other governments. When in need of money for governmental purposes, which it is not deemed wise to undertake to raise by current taxation, they issue and sell their interest-bearing bonds. Purchasers and holders of these bonds rely for their security upon the good faith and unimpaired credit of the government whose bonds they buy and hold as investments. These bonds usually yield a less income than that derived from other investments of unquestioned security. They are usually, by express statutory provision, exempt from taxation in the hands of purchasers and holders. The difference in income from government bonds and from other investments of unquestioned security is measured to some extent by the amount of the tax or taxes levied or assessed by the government on investments other than these bonds. Investors are thereby induced to buy government bonds notwithstanding the fact that they bear interest at a less rate than other sound investments. These investors rely upon the integrity of the statutory provisions exempting such bonds from taxation. Good faith to purchasers and holders of such bonds demands that the integrity of these statutory provisions, when they are clearly expressed and free from doubt, shall not be impaired by administrative or judicial construction. The credit of governments issuing nontaxable bonds is enhanced by their free and unrestricted marketability. A policy which would restrict the marketability of nontaxable government bonds, after they have been sold and while they are in the hands of holders, would be in violation of good faith on the part of the government which has issued and sold said bonds and would necessarily tend to impair the credit of such government. Owners of property and of other investments which are by law subject to taxation would not be benefited by such a policy. It would result ultimately in an increase of their tax burden. They would be the chief sufferers from a policy which would be regarded as in violation of good faith and which would necessarily result in the impairment of the credit of their government.

It has been uniformly held by this Court that statutory provisions exempting bonds, issued and sold by the State of North Carolina under legislative authority, from taxation by the State or its taxing subdivisions, are valid, notwithstanding the provision in the Constitution which requires that all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise, shall be taxed by uniform rule. Holders of such bonds may avail themselves of such exemption. In *Pullen v. Corporation Commission,* 152 N. C., 548, 68 S. E., 155, it is said that the uniform and well-settled policy of this State, certainly since 1852, has been to exempt its own bonds and certificates of debts from taxation. The power of the General Assembly to declare that bonds issued by its authority shall be exempt from taxation by the State, has never been doubted or called in question. In the opinion written for the Court, sustaining the validity of a statutory provision exempting certain bonds of the State from taxation, *Manning, J.,* said:

"The State and its taxpayers are not without compensating advantage for this exemption from taxation conferred upon the bonds issued by the State, because it is thereby enabled to sell its bonds, bearing interest at only four per cent, not only at their par value, but at a premium, and thus, if residents and citizens of the State—those liable to pay it tribute in taxes—own the bonds of the State, what the State and its taxing subdivisions, created by it, may lose in revenue by permitting the bonds to be taxed, is saved by the State and its taxpayers in having to pay a much reduced rate of interest on the bonds."

With respect to the liability of holders of bonds issued by the United States under the authority of Congress, to taxation on such bonds by a State, it is said to be well settled that bonds, treasury notes and other obligations of the United States are exempt from all taxation by or under State authority. Such bonds are means by which the United States performs its governmental functions and, on the principle that agencies of the Federal Government are not subject to taxation by a State, are exempt from State taxation. It is, therefore, not necessary for Congress to secure this immunity by a declaration in terms, as such declaration does not operate to withdraw from the States any power or right previously possessed by them. 26 R. C. L., p. 100, sec. 76.

It is not contended by the defendants in the instant case that plaintiff's intestate was liable for the taxes assessed against him by reason of his ownership on the first of May, 1925 and 1926, of the United States tax-exempt bonds, purchased by him in good faith, in the open market, prior to said dates. Defendants contend that he was liable for said taxes for that his transactions with reference to said bonds as found by the court, were in violation of a statute of this State and were a fraud upon the defendant, Nash County. Neither of these contentions can be sustained.

The statute relied upon by defendants is as follows: "Any person who, to evade the payment of taxes, surrenders or exchanges certificates of deposit in any bank in this State or elsewhere for nontaxpaying securities or surrenders any taxable property for nontaxable property, and, after the date of listing property has passed, takes said certificates or other taxable property back, and gives up said nontaxpaying securities or property, shall be guilty of a misdemeanor and upon conviction shall be fined not less than $50 nor more than $200 or imprisoned not less than one month nor more than six months, or both." Section 54, chapter 102, Public Laws 1925; section 53, chapter 71, Public Laws 1927.

Upon the facts found by the judge of the Superior Court, to which there was no exception, the transactions of plaintiff's intestate with reference to the bonds was not a violation of the statute. They were in good faith and resulted in said intestate acquiring the title, both legal and equitable, to said bonds, which he held on the day fixed by statute for listing property subject to taxation. As he did not own on said day a deposit in the bank to his credit, he could not be held liable for the tax assessed against him by the defendant, Nash County. The statute does not undertake to make a transaction which by its provisions is a misdemeanor, void; on the contrary the validity of the transaction, in so far as it affects the title to property, both taxable and nontaxable, involved therein, is assumed. It is only when the purpose of the transaction, to wit, an evasion of taxation, is accomplished, that the transaction is made by statute a misdemeanor. The statute cannot be justly construed as attempting to make a transaction within its provisions void. The only penalty prescribed by the statute for its violation is a fine or imprisonment, or both.

Nor can it be held that the transactions of plaintiff's intestate with reference to said bonds were a fraud upon the defendant, Nash County. The county has lost no taxes to which it was entitled under the law as a result of said transactions. The mere change in ownership of the taxable and of the nontaxable property did not relieve the owner of the taxable property on the first day of May from liability for taxes; nor could it impose such liability upon the owner on said day of the nontaxable property. Plaintiff's intestate was not forbidden by statute or by any just principle of law from purchasing in good faith prior to the date on which he was required to list his property for taxes, nontaxable property and paying therefor by his check on a bank deposit which would have been liable to taxation had he owned the deposit on the tax-listing day, to wit, the first day of May, thereafter. We find no error in the judgment. It is

Affirmed.

CLARKSON, J., concurring: I concur in the result on the peculiar facts appearing of record and the language of the statute under which liability for tax is asserted. *S. v. R. R.,* 145 N. C., at p. 539 *et seq.; S. v. R. R.,* 168 N. C., 103; *Trust Co. v. Burke,* 189 N. C., 69; *Noland Co. v. Trustees,* 190 N. C., 250.

I am authorized to say that the *Chief Justice* concurs in the result upon the same grounds stated herein.

STATE v. JOHN GOODING.

(Filed 6 March, 1929.)

1. **Assault Upon a Female—Evidence—Weight and Sufficiency.**

   Upon the issue of whether the defendant committed an assault upon a female, her testimony that she was suddenly caught from behind by her arms by the defendant and that she freed herself by her violent exertions and that the defendant explained that he wanted to know how her arms felt, is sufficient to take the case to the jury.

2. **Appeal and Error—Record—Matters Not Set Out in Record Deemed Without Error.**

   On appeal the charge of the trial court is presumed to be correct when it is not set out in the record.

3. **Trial—Reception of Evidence—Motions to Strike Out.**

   Where exception is taken to a question asked a witness and the answer of the witness is not responsive, a motion to strike out the answer should be made, and where this is not done the exception will not be considered on appeal.

4. **Trial—Instructions—Requests for Instructions.**

   If a party desires that an unresponsive answer not be considered by the jury he should request an instruction to that effect.

APPEAL by defendant from *Nunn, J.*, and a jury, at September Term, 1928, of JONES. No error.

The defendant was indicted for an assault and battery on one Callie Lee Hill, a female. There was a verdict of guilty rendered by the jury, and the defendant was sentenced to be confined in the common jail for eighteen months and assigned to work the roads of Lenoir County.

Punishment prescribed in C. S., 4215.

The defendant made the exceptions and assignments of error which will be considered in the opinion, and appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Shaw & Jones for defendant.

PER CURIAM. The defendant at the close of the State's evidence and at the close of all the evidence made a motion for judgment of nonsuit. C. S., 4643. This motion cannot be sustained.

The prosecutrix testified "that she was the wife of Tom Hill; that she went into the store of the defendant, John Gooding, to get some kerosene; that the wife and an 18-year-old daughter were in the kitchen, where she had gone and that she had her little child with her. This was all in the day time. That the defendant came in, and the first time she knew he was there he grabbed her by the arms from the back and held her so tight she had to use all her strength to release herself; that the defendant stated when she had released herself that he just wanted to see how her arms felt."

The charge is not set out in the record; the presumption is that the court below correctly instructed the jury the law as to what constituted assault and battery and applied the law to the facts.

Any unlawful beating or other wrongful physical violence or constraint inflicted on a human being without his or her consent is a battery. The evidence was sufficient to be submitted to the jury—the probative force was for them.

The following question was asked the prosecuting witness, to which exception and assignment of error was duly made: "Q. Had he been to your house before? Answer: I have heard him say that he could hug and kiss any of the white women in the community, and that he did hug and kiss all of the other white women in the community."

We could not say that the question was objectionable, but the answer seems not to be responsive to the question. It is well settled in this jurisdiction that defendant's objection should have been accompanied by a motion to strike the objectionable statement from the record if he deemed it incompetent and prejudicial. If he desired to do so, he should have requested an instruction to the effect that the jury should not consider it as evidence. *Luttrell v. Hardin,* 193 N. C., at p. 269. In the record we find

No error.

CARAH E. LASSITER v. J. H. ADAMS, ADMINISTRATOR OF A. G. ADAMS ET AL.

(Filed 6 March, 1929.)

1. **Municipal Corporations—Officers, Agents and Employees—Personal Liability of Officers.**

Public road officials of a township may not be held personally liable for their official acts in the absence of allegations that the acts were done maliciously or corruptly.

2. **Pleadings—Demurrer—When Demurrer May Be Pleaded.**

Objections to the sufficiency of the complaint to state a cause of action may be taken at any time in the orderly progress of the trial, or in the Supreme Court, or the Court may *ex mero motu* take notice of the insufficiency.

APPEAL by plaintiff from *Daniels, J.,* at September Term, 1928, of JOHNSTON. Affirmed.

A. M. Noble for plaintiff.
James D. Parker for defendants.

PER CURIAM. It is admitted in the answer and set out in the judgment that the defendants at the time of the alleged trespass were acting in their capacity as road commissioners of Bentonville Township. There is no allegation that they acted maliciously or corruptly. *Hipp v. Ferrall,* 169 N. C., 551; S. c., 173 N. C., 167. The judgment contains the further recital that the action was instituted against public road officials; that more than six months intervened between the completion of the road and the commencement of the action; that the plaintiff knew within two months of the completion of the road that it had been laid out and opened, and that it has been accepted and is now used by the county authorities. C. S., 3667. On motion of the defendants the court dismissed the action. The judgment is affirmed. An objection that the complaint does not state a cause of action may be taken advantage of at any time. In such case the defendant may demur *ore tenus* or the Supreme Court of its own motion may take notice of the insufficiency. *Johnson v. Finch,* 93 N. C., 205; *Garrison v. Williams,* 150 N. C., 674; *McDonald v. MacArthur,* 154 N. C., 122.

Affirmed.

N. W. HARDISON v. JOHN JONES AND HIS WIFE, CHARITY JONES.

(Filed 6 March, 1929.)

1. **Trial—Instruction—Objections and Exceptions.**

   Alleged error of the court in stating the contentions of a party must aptly be called to the attention of the judge with request for correction in order to be considered on appeal.

2. **Bills and Notes—Actions—Burden of Proof.**

   Where the execution of the note in suit is not admitted by defendant the burden of proof is on the plaintiff to show it.

3. **Appeal and Error — Review — Discretion of Court — Setting Aside Verdict.**

   A motion to set aside a verdict of the jury as being against the weight of the evidence is addressed to the sound discretion of the trial court, and is not reviewable on appeal.

APPEAL by plaintiff from *Nunn, J.,* at Fall Term, 1928, of PAMLICO. No error.

Action for judgment on notes and for foreclosure of mortgage securing same. Plaintiff alleged that both the notes and the mortgage were executed by defendants. Defendant, Charity Jones, denies that she executed either the notes or the mortgage. She is the owner of the land described in the mortgage.

The first issue submitted to the jury was answered as follows:

"Did the defendant, Charity Jones, execute the notes and mortgages as alleged in the complaint? Answer: No."

The other issues, under the instructions of the court, were not answered by the jury.

From judgment on the verdict plaintiff appealed to the Supreme Court.

Whitehurst & Bardin and Z. V. Rawls for plaintiff.
F. C. Brinson and Ward & Ward for defendant.

PER CURIAM. Plaintiff's assignments of error on his appeal to this Court cannot be sustained. They are based:

(1) Upon an exception to the overruling of plaintiff's objection to a question addressed to a witness for defendant with respect to his knowledge of the general reputation of plaintiff. Plaintiff had testified as a witness on his own behalf. The witness replied that he did not know the general reputation of plaintiff.

(2) Upon an exception to a statement by the court in the charge to the jury of defendants' contention as to what a witness had testified to with respect to plaintiff's general reputation. The error, if any, was not called to the attention of the court, in apt time, with a request that the error be corrected. *S. v. Geurukus,* 195 N. C., 642, 143 S. E., 208.

(3) Upon an exception to an instruction of the court to the jury with respect to the burden of proof upon the first issue. The jury was properly instructed that the burden of proof upon this issue was on plaintiff. Defendant denied the execution of the notes and of the mortgage set out in the complaint. She did not admit their execution, and rely upon fraud or other defenses to plaintiff's recovery in this action.

There was no motion for judgment as of nonsuit, under C. S., 567. Plaintiff moved the court to set the verdict aside, for that same was against the weight of the evidence. This motion was addressed to the discretion of the trial court. Its refusal is not reviewable by this Court. *Wood v. R. R.,* 131 N. C., 48, 42 S. E., 462. The judgment must be affirmed. We find

No error.

STATE v. WILLIAM LEE.

(Filed 13 March, 1929.)

1. **Trial—Instructions—Requests for Instructions—Duty of Trial Court to Grant.**

   A request for instructions correctly embodying the law of the case arising from the evidence and material to the case must be substantially given by the court, and its refusal will constitute reversible error.

2. **Criminal Law—Capacity to Commit and Responsibility for Crime—Mentality—Intoxicating Liquors—Disease.**

   A person who from long continued use of alcoholic drinks and the long course of a disease affecting his mind is incapable of knowing the nature of his act in committing a murder or whether it was wrongful or not, as distinguished from the immediate effects of drink, will not be held in law guilty of the criminal offense of murder charged in the bill of indictment.

3. **Appeal and Error—Record—Record Conclusive on Appeal.**

   The record of the case on appeal containing discrepancies will be taken by the Court as therein appearing.

APPEAL by defendant from *Grady, J.,* at October Term, 1928, of DUPLIN.

Criminal prosecution tried upon an indictment in which it is charged that the prisoner, William Lee, did on 15 September, 1928, unlawfully, wilfully and feloniously, of his malice aforethought, kill and murder one Ollin Maynard, contrary to the statute in such cases made and provided and against the peace and dignity of the State.

The evidence on behalf of the State, as recited by the judge in his charge, tends to show that the prisoner and the deceased had engaged in an exchange of words, on the day in question, which caused the prisoner to go to his home, get his gun, return to the home of the deceased, and shoot the latter while he was sitting in a chair, near a table, either reading or nodding, inflicting immediately mortal wounds.

From the evidence in the record it appears that Ollin Maynard, a colored man, was killed with a shot gun 15 September, 1928; that the prisoner was seen with a shot gun near the scene of the killing, immediately after the shooting, and that some time thereafter he asked to be taken to jail, stating that "me and a man got in a argument and I shot him. He was arguing with me and had a pistol in his hand and was coming towards me."

The prisoner testified that he had been suffering from syphilis for about eight years; that he had been drinking heavily for two years or longer, and that he had drunk more than a pint of liquor that morning. "I don't remember about going to Ollin's, or what happened, and the only thing I remember was that Clenny Newkirk gave me a shell (with which to kill his dog). The next thing I knew about it was that evening."

There was other evidence tending to show that "when the prisoner was not drunk, he was hunting something to drink. He complained of a pain in his head and said it took whiskey to relieve it. He did not have sense enough to do much work."

Dr. Linville, expert on mental diseases, testified: "I have examined William Lee, and find that he is suffering with syphilis in its last stage. The disease can have almost any effect upon the body and mind. I have found that he has blood pressure of 190, and it should be 140, and all of the glands of his body are infected, and one has opened up and ruptured. In talking to him he at times will talk to you pretty straight, and at other times you don't seem to get anything out of him. He will tell you one thing one minute and another thing another minute. He is twisted in his judgment. He is not what you would call crazy, but he has never been very bright, and he has the appearance of one you would judge to have been weak. In my opinion, I do not think that he had sufficient (mental) capacity (at the time of the killing) to plan and deliberate. The disease he has been suffering with would cause pains in the head."

Dr. Straughan, after qualifying as an expert, testified: "He (defendant) has syphilis in the third or last stage. One having syphilis of the brain, as he does, oftentimes is delirious and goes off in a trance or have complete loss of memory. They may have it at any time during the course of the disease. My examination of him shows that he has had the disease over a period of years. I could not say definitely how many, but several years. In my opinion he did not have sufficient mental capacity to plan and deliberate (at the time of the killing), a fixed design."

In apt time the prisoner requested the court, among other things, to instruct the jury as follows:

"The jury is instructed that although they might find from the evidence that the defendant committed the criminal act, in the manner and form as charged in the indictment, still, if the jury believe from the evidence that at the time he committed the act he was so affected by long and continued use of alcoholic liquors or disease, or both, that he did not know the nature of the act, whether it was wrongful or not, and did not know his relations to others, and that such mental deficiency was induced by antecedent and long continued use of such intoxicating drinks or disease, and not the immediate effects of intoxication, then the defendant cannot be held criminally responsible for such act, and the jury should find the defendant not guilty."

The court declined to give this instruction, and such refusal forms the basis of one of the prisoner's exceptive assignments of error.

Verdict: Guilty of murder in the first degree.

Sentence: Death by electrocution.

The prisoner appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

R. D. Johnson and D. L. Carlton for defendant.

STACY, C. J., after stating the case: The rule obtains with us that when a party duly makes request for a special instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, nevertheless is required to give the instruction, in substance at least, and unless this is done, either in direct response to the request or otherwise in some portion of the charge, the failure, if properly presented on appeal, will be held for reversible error. *Parks v. Trust Co.,* 195 N. C., 453, 142 S. E., 473; *Marcom v. R. R.,* 165 N. C., 259, 81 S. E., 290; *Irvin v. R. R.,* 164 N. C., 6, 80 S. E., 78; *Lloyd v. Bowen,* 170 N. C., 216, 86 S. E., 797; *Rencher v. Wynne,* 86 N. C., 269.

In *Baker v. R. R.,* 144 N. C., 36, 56 S. E., 553, *Walker, J.,* delivering the opinion of the Court, gives the reason for the rule as follows: "We have held repeatedly that if there is a general charge upon the law of the case, it cannot be assigned here as error that the court did not instruct the jury as to some particular phase of the case, unless it was specially requested so to do. *Simmons v. Davenport,* 140 N. C., 407. It would seem to follow from this rule, and to be inconsistent with it if we should not so hold, that if a special instruction is asked as to a particular aspect of the case presented by the evidence, it should be given by the court with substantial conformity to the prayer. We have so distinctly held recently in *Horne v. Power Co.,* 141 N. C., at p. 58, in which *Connor, J.,* speaking for the Court and quoting with approval from *S. v. Dunlop,* 65 N. C., 288, says: 'Where instructions are asked upon an assumed state of facts which there is evidence tending to prove, and thus questions of law are raised which are pertinent to the case, it is the duty of the judge to answer the questions so presented and to instruct the jury distinctly what the law is, if they shall find the assumed state of facts; and so in respect to every state of facts which may be reasonably assumed upon the evidence.' "

In the instant case the prisoner in apt time preferred the special instruction, as above set out, which was taken almost verbatim from an instruction given and approved in *S. v. English,* 164 N. C., 498, 80

S. E., 72. See, also, *S. v. Ross,* 193 N. C., 25, 136 S. E., 193, and *S. v. Allen,* 186 N. C., 302, 119 S. E., 504. It would seem that the prisoner was entitled to have this instruction given substantially in the form as requested. *Lloyd v. Bowen, supra.*

The case on appeal, which was not settled by the trial judge, presents several discrepancies, but we must take the record as we find it.

For the error, as indicated, in failing to give the instruction, substantially as requested, a new trial must be awarded, and it is so ordered.

New trial.

BRENT RHYNE, GUARDIAN OF R. H. RHYNE, v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 13 March, 1929.)

Insurance — Forfeiture of Policy for Breach of Promissory Warranty, Covenant, or Condition Subsequent — Nonpayment of Premiums — Disability — Notice.

A waiver of the premium on a life insurance policy and the payment to the insured of a certain amount of money monthly in case of his permanent and total disability upon due notice and proof to be given the insurer before the time "the next premium on the policy becomes due," will not work a forfeiture for failure to give the notice if the insured is under such disability as to incapacitate him from giving the notice specified, and the failure to give the notice is not attributable to any fault of his.

APPEAL by plaintiff from *Finley, J.,* at June Term, 1928, of BURKE.

Civil action by plaintiff, guardian of R. H. Rhyne, an insane person, to recover under the permanent disability clauses of two insurance policies.

On 20 February, 1926, the defendant issued to Robert H. Rhyne a life insurance policy in the sum of $5,000, and again on 15 December, 1926, the defendant issued another policy to the said Robert H. Rhyne in the sum of $2,500. The first of said policies provides for the "waiver of all future premiums and monthly payments for life of $50" in case of total and permanent disability, if, after payment of the first and before default in the payment of any subsequent premium, "the insured shall furnish to the company due proof that he has been wholly and continuously disabled by bodily injuries or disease and will be permanently, continuously and wholly prevented thereby from pursuing any occupation whatsoever for remuneration or profit." The second of said policies provides for the "waiver of all future premiums and monthly payments for life of $25," if, while the policy is in force and before default in the payment of any premium, "the insured shall furnish to the company due proof that he has become totally disabled by bodily injuries or disease," etc.

The premiums due on the first policy were paid up to 20 March, 1927, including the 30-day period of grace, and the premiums due on the second policy were paid up to 15 May, 1927. No further premiums were paid on said policies after the respective dates above mentioned, and it is the contention of the defendant that both of said policies lapsed for nonpayment of premiums on the respective dates aforesaid.

On 19 August, 1927, the assured was committed to the State Hospital for the Insane at Morganton, where he still remains. Plaintiff qualified as his guardian 29 September, 1927. There was evidence from which the jury could find that the assured became insane in January or February, 1927, during the life of the policies in suit. Plaintiff brings this action to recover, for the benefit of the assured, the life annuities provided for under the total and permanent disability clauses contained in said policies.

It being admitted that proofs of total and permanent disability were not furnished to the insurance company prior to 20 March, 1927, or 15 May, 1927, judgment of nonsuit was entered on motion of the defendant.

Plaintiff appeals, assigning errors.

Avery & Patton and Spainhour & Mull for plaintiff.

Brooks, Parker, Smith & Wharton, S. J. Ervin and S. J. Ervin, Jr., for defendant.

STACY, C. J., after stating the case: The appeal presents the single question as to whether total disability or insanity, which renders an assured incapable of giving notice of injury or disease, required by the terms of an insurance policy, can be said to have been reasonably within the minds of the parties at the time of the making of the contract, in the absence of unequivocal language dealing with such a situation. We think not.

It is considered by a majority of the courts that a stipulation in a contract of insurance requiring the assured, after suffering injury or illness, to perform some act, such as furnishing to the company proof of the injury or disability within a specified time, ordinarily does not include cases where strict performance is prevented by total incapacity of the assured to act in the matter, resulting from no fault of his own, and that performance within a reasonable time, either by the assured after regaining his senses or by his representative after discovering the policy, will suffice. *Guy v. U. S. Casualty Co.,* 151 N. C., 465, 66 S. E.,

437; Annotation: 54 A. L. R., 611; Notes: 27 L. R. A. (N. S.), 319; 18 L. R. A. (N. S.), 109; 14 L. R. A. (N. S.), 503; Ann. Cas., 1914D, 413; 14 Ann. Cas., 294; 14 R. C. L., 1333.

It may be conceded that the decisions are variant as to whether, under any circumstances in a case like the present, liability can survive failure to comply with the requirement of notice. The clear weight of authority, however, seems to be in favor of the plaintiff's position. The reasons assigned by the different courts, in support of the majority view, are not altogether harmonious, and some perhaps are inconclusive. They are all considered in a learned opinion by *Nortoni, J.*, in *Roseberry v. Association,* 142 Mo. App., 552, 121 S. W., 785. But we are content to place our decision on the broad ground that, notwithstanding the literal meaning of the words used, unless clearly negatived, a stipulation in an insurance policy requiring notice, should be read with an exception reasonably saving the rights of the assured from forfeiture when, due to no fault of his own, he is totally incapacitated from acting in the matter. That which cannot fairly be said to have been in the minds of the parties, at the time of the making of the contract, should be held as excluded from its terms. *Comstock v. Fraternal Accident Association,* 116 Wis., 382, 93 N. W., 22. The primary purpose of all insurance is to insure, or to provide for indemnity, and it should be remembered that, if the letter killeth, the spirit giveth life. *Allgood v. Ins. Co.,* 186 N. C., 415, 119 S. E., 561; *Grabbs v. Ins. Co.,* 125 N. C., 389, 34 S. E., 503.

If the majority view be correct, and we are disposed to think that it is, it follows that there was error in granting the defendant's motion for judgment of nonsuit.

Reversed.

J. T. WHARTON v. EMPIRE MANUFACTURING COMPANY.

(Filed 13 March, 1929.)

Waters and Water Courses—Natural Water Courses—Liability for Obstructing and Ponding Water—Permanent Damages.

Continuing damages caused to the lands of an upper proprietor by the ponding of water by the lower proprietor back upon them may be recovered by the former in his action brought every three years for damages occurring within that period assessed to the time of the trial, or at his option he may sue for the entire damages when they are of a permanent nature, but when it is made to appear that the nuisance causing the damage has been entirely abated, pending the action, the measure of damages will only be laid up to the time of the abatement.

APPEAL by defendant from *Nunn, J.*, and a jury, at November Term, 1928, of PAMLICO. Error.

This is an action brought by plaintiff against defendant, a lumber company, for temporary and permanent damage, for negligently ponding water on his land.

The issues submitted to the jury and their answers thereto were as follows:

"1. Were the plaintiff's crops and land damaged by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. What damage, if any, is plaintiff entitled to recover to his crops within three years preceding the bringing of the action? Answer: $1,000.

3. Is plaintiff's cause of action for damages to his crops barred by the statute of limitations? Answer: No.

4. What permanent damage, if any, is plaintiff entitled to recover to his lands, as alleged in the complaint? Answer: $2,000.

5. Is plaintiff's cause of action for damages to his land barred by the statute of limitations as alleged in the answer? Answer: No."

Defendant excepted and assigned error as follows: "The court erred in submitting the issues to the jury as set out in the record, as to the permanent damage to the land and as to the permanent injury thereto, particularly on the fourth issue submitted to the jury by the court upon the ground that no such issue could properly be submitted under the facts in this case, and the allegation of the plaintiff prior to the adoption of the issue, and at every stage the defendant had contended that there was no question of permanent damages in this case and tendered the removal and abatement of any construction of its ways or appliances, which under all the evidence in the case had been abandoned and removed before this action was brought and which are not now being used by the defendant in any manner, if the jury should find that such ways and appliances had been wrongfully constructed or caused damage to the plaintiff."

Defendant excepted and assigned error as follows: "The court erred in refusing to sign the judgment upon the issues which were tendered by the defendant, offering to abate any nuisance or ordering the removal of any cause thereof under the direction of the court and eliminating the issue of permanent damages, as set out in exception 68." This exception was in reference to the fourth issue as to permanent damage.

D. L. Ward, Abernethy & Abernethy and Z. V. Rawls for plaintiff.
Langston, Allen & Taylor and Moore & Dunn for defendant.

CLARKSON, J. In some cases it has been held that when one erects a substantial building or other structure of a permanent character on his own land, which wrongfully invades the rights of adjoining property, which creates a nuisance or trespass, the injured party may accept or ratify the feature of permanence and sue at once for the entire damage, and in cases strictly of private ownership, the weight of authority seems to be that separate actions must be brought for the continuing or recurrent wrong and plaintiff can only recover damages to the time the action is commenced. In this jurisdiction, however, to the time of the trial. *Webb v. Chemical Co.,* 170 N. C., 662; *Morrow v. Mills,* 181 N. C., 423; *Mitchell v. Ahoskie,* 190 N. C., 235; *Langley v. Hosiery Mills,* 194 N. C., 644; *Winchester v. Byers, ante,* 383; *Peacock v. Greensboro, ante,* 416.

In the *Winchester case, supra,* at p. 385, speaking to the subject, it is said: "The distinction is readily observed, ordinarily private property cannot be taken for private purposes without the consent of the owner. For public purposes it can be taken only after payment of just compensation."

In the *Peacock case, supra,* at p. 417, it is said: "As there has been no appropriation of his land for permanent purposes, he is not entitled to recover permanent damages."

With the law thus stated, we are of the opinion that the exceptions and assignments of error made by defendant to the submission of the fourth issue as to permanent damage must be sustained, and also to the refusal of the court below to sign the judgment tendered by defendant.

The plaintiff must pay the cost on appeal to this Court. In the judgment below there is

Error.

TOWN OF JACKSONVILLE v. J. W. BRYAN AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

(Filed 13 March, 1929.)

1. **Insurance—Guaranty and Indemnity Insurance—Bonds of Municipal Officers or Agents—Extent of Liability.**

A bond indemnifying against loss arising from the defalcation of its collecting agents, naming a limit of its liability and providing for a renewal upon the payment of another premium, and providing that the liability shall not exceed that named in the policy originally issued, whether the loss shall occur during the term named or any continuances, by its express terms excludes a liability for losses occurring during the original and renewal periods beyond the amount stated in the policy originally issued. *S. v. Martin,* 188 N. C., 119, cited and distinguished.

2. Insurance—Contract—Reformation—Fraud—Mutual Mistakes.

Where an indemnity bond expressly excludes liability beyond a certain amount, it cannot be maintained that it was misleading to the insured in the absence of mutual mistake or fraud.

STACY, C. J., not sitting.

APPEAL by plaintiff from *Grady, J.,* at December Special Term, 1928, of ONSLOW. Affirmed.

John D. Warlick and Varser, Lawrence, Proctor & McIntyre for plaintiff.

Summersill & Summersill and D. L. Ward for defendants.

CLARKSON, J. This is a civil action brought by plaintiff to recover on bonds given by J. W. Bryan, as principal, and United States Fidelity and Guaranty Company as surety, to the town of Jacksonville. J. W. Bryan was water-rent collector and tax collector for plaintiff. He entered upon his duties 1 January, 1925, and gave two bonds 1 October, 1925. One bond was for $1,000 as water-rent collector, and the other was for $5,000 as tax collector, his surety in both bonds being United States Fidelity and Guaranty Company. This appeal presents a controversy alone over the $1,000 water-rent collector bond. In the water-rent collector bond we find the following: United States Fidelity and Guaranty Company "(1) hereby agrees that it shall reimburse the employer (the plaintiff) for any pecuniary loss sustained, not exceeding one thousand dollars ($1,000) of money, securities, merchandise or any property occasioned by any act or acts of larceny or embezzlement by the employee (J. W. Bryan) in the performance of the duties of the position as aforementioned, during the period commencing from 1 October, 1925, to 1 October, 1926, subject to the conditions expressed in this bond, which shall be conditions precedent to the right of the employer to recover hereunder. . . . (2) *This bond may be continued from year to year by the payment of the annual premium to the surety and the issuance by the surety of its continuation certificate, provided that the liability of the surety shall not exceed the amount above written, whether the loss shall occur during the term above named, or during any continuation thereof, or partly during said term and partly during said continuation."* (Italics ours.)

The judgment of the court below was: "That the plaintiff have and recover of the defendant, J. W. Bryan, the sum of $1,814.10 with interest thereon from 1 October, 1926, and the further sum of $876.34, with interest thereon from 1 October, 1927; and that the plaintiff recover of the defendant, United States Fidelity and Guaranty Company the sum of one thousand dollars, the penalty of the bond issued by it to cover water rents collected by its codefendant, which amount, when paid, shall be credited on the above amounts adjudged to be due the plaintiff by said J. W. Bryan."

The water-rent bond for $1,000 was given 1 October, 1925, for one year ending 1 October, 1926, and then continued by the issuance of the "continuation certificate" for one year ending 1 October, 1927.

The sole question presented upon the record is whether the bond for water rents can be construed as securing the plaintiff to the extent of $1,000 each year of the defendant Bryan's incumbency. Plaintiff contends that said surety liability is $2,000, instead of $1,000, as held by the court below. Each year the defendant Surety Company received from the plaintiff the annual premium without abatement and issued its continuation certificate.

S. v. Martin, 188 N. C., 119, is not an authority in the present action. In that case the payment of premium and the language of the bond, and the statute requiring a bond for each term, was construed as a new bond given for each term. Each bond was liable for the defalcation that occurred in each term. It is there said: "Each term, like every tub of Macklinian allusion, 'must stand on its own bottom.'" Here the language of the bond clearly limits the liability to $1,000. Plaintiff earnestly contends it was misled especially when it paid a like premium for a continuation certificate. No doubt plaintiff took it for granted that each year it had a $1,000 protection. But we must abide by the written words. *Supply Co. v. Plumbing Co.,* 195 N. C., 629.

Speaking to the subject in *Colt v. Kimball,* 190 N. C., at p. 173, citing numerous authorities, it is said: "Having executed the contract, and no fraud appearing in the procurement of the execution, the court is without power to relieve the defendant on the ground that he thought it contained provisions which it does not. He is concluded thereby to the same extent as if he had known what due diligence would have informed him of, to wit, its plain provisions." *Cromwell v. Logan, ante,* 588; *Mich. Mortgage-Investment Corp. v. Amer. Em. Ins. Co.* (October, 1928), 244 Mich., 72, 221 N. W., 140. See cases pro and con in the main opinion and dissent. *Bank v. Guaranty Co.,* 110 Tenn., 10, 75 S. W., 1076. See note in 42 A. L. R., p. 834 *et seq.*

It may not be amiss to say that from the many cases that reach this Court, similar to the present, those who make contracts like the one in controversy—officials and others—should read them with care. This Court cannot write, but must construe contracts as written. Relief can only be granted in a case like this for mutual mistake or fraud. An interesting article can be found in the Michigan Law Review (February, 1928), p. 442, entitled "Fidelity Bonds—Does it pay to renew them?" It criticises severely a bond like the present as "heads I win tails you lose." It suggests a relief by the companies themselves or *legislative action.* The judgment below is

Affirmed.

STACY, C. J., not sitting.

COASTAL LAND AND TIMBER COMPANY v. L. Z. EUBANK AND I. R. EUBANK, AND I. R. EUBANK v. JONES-ONSLOW LAND COMPANY AND COASTAL LAND AND TIMBER COMPANY.

(Filed 13 March, 1929.)

Trespass to Try Title—Actions—Complaint—Demurrer—Sufficiency of Description of Property—Injunctions.

A description of land as being a five thousand-acre tract along the line of a certain railroad track, and within a 59,025-acre tract granted by the State to a certain person, is too vague and indefinite to admit of evidence to fit the *locus in quo* to the description, and is an insufficient allegation in the complaint in an action involving its title, and a demurrer to the complaint is properly sustained.

APPEAL by Coastal Land and Timber Company from *Grady, J.,* at Special Term, December, 1928, of ONSLOW. *Case No. 1.* Affirmed.

APPEAL by I. R. Eubank from *Grady, J.,* at Special Term, December, 1928, of ONSLOW. *Case No. 2.* Dismissed.

Nere E. Day and Cowper, Whitaker & Allen for plaintiff.

John D. Warlick and Abernethy & Abernethy for defendants in Case No. 1.

John D. Warlick and Abernethy & Abernethy for plaintiff.

Nere E. Day and Cowper, Whitaker & Allen for defendants in Case No. 2.

CLARKSON, J. *Case No. 1.* The Coastal Land and Timber Company against L. Z. Eubank and I. R. Eubank. The only question presented: Is the description contained in the complaint and amendments thereto (except that portion thereof called the 130-acre tract, covered by grant to A. C. Riggs and I. R. Eubank) so uncertain on its face that it is not susceptible of being located, either by parol evidence or any other kind of competent evidence? We think so.

The original complaint reads as follows: "The plaintiff, complaining of the defendants, alleges and says: (1) That plaintiff is a corporation, chartered in North Carolina. (2) That the plaintiff is the owner in fee of the certain tract of land situated in Onslow County, North Carolina, lying on the east side of the Atlantic Coast Line Railroad track, containing 5,000 acres, more or less, and being a part of Grant No. 739, to David Allison for 59,025 acres, dated 6th day of June, 1795."

The amended complaint reads as follows: "That the plaintiff is the owner in fee and in possession of the certain tract of land situated in Onslow County, North Carolina, lying on the east side of the Atlantic Coast Line Railroad track, containing 5,000 acres, more or less, and being part of a grant to David Allison for 59,025 acres, dated the 6th day of June, 1795, the said tract, including grant to A. C. Riggs and I. R. Eubank for 130 acres, dated 11 March, 1904."

The defendants demurred *ore tenus* on the ground that the description of the land, both in the complaint and amended complaint, was too uncertain, indefinite and insufficient to be aided by parol testimony. We are of the opinion that this contention is correct. This matter has been recently discussed and authorities cited in *Bryson v. McCoy,* 194 N. C., 91, which sustains the contentions of defendants.

Case No. 2 is an action brought by I. R. Eubank against Jones-Onslow Land Company and Coastal Land and Timber Company, to set aside what purported to be a consent judgment as null and void. The decision in the first action renders the second action academic even if plaintiff alleged a cause of action and has pursued the right remedy. This action is dismissed.

In this Court the cost will be divided between the parties.

The first case is affirmed.

The second case is dismissed.

STATE v. MACEO PUGH.

(Filed 13 March, 1929.)

Indictment—Issues, Proof, and Variance—Nonsuit.

Where the bill of indictment for larceny and receiving charges ownership of the property as that of a person named therein and as to such owner there is no evidence, the defendant's motion to dismiss as in case of nonsuit should be allowed for failure of proof.

APPEAL by defendant from *Nunn, J.,* at January Term, 1929, of LENOIR.

Criminal prosecution tried upon an indictment charging the defendant and another with larceny and receiving.

Verdict: Guilty.

Judgment: Six months on the roads.

Defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Shaw & Jones for defendant.

STACY, C. J. The bill of indictment charges the defendant and another with the larceny of "334 pounds of leaf tobacco, of the value of $58.97, the goods and chattels of L. B. Jenkins Company," and with receiving same knowing it to have been feloniously stolen or taken in violation of C. S., 4250. There is no evidence on the record tending to show that the tobacco, if stolen or received with knowledge of its larceny by another, was the property of L. B. Jenkins Company. *S. v. Haddock,* 3 N. C., 162. Proof of the *corpus delicti,* therefore, is wanting, or the crime as charged is not supported by the evidence. Hence, the defendant's motion to dismiss or for judgment as in case of nonsuit should have been allowed. Allegation without proof is unavailing. *S. v. Corpening,* 191 N. C., 751, 133 S. E., 14.

Reversed.

LEWIS DICKEY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 13 March, 1929.)

1. **Railroads — Operation — Accidents at Crossings—Negligence—Proximate Cause—Ordinances.**

Where there is evidence in an action against a railroad company tending to show that a freight train was blocking a street of a town in violation of an ordinance forbidding it to do so for more than ten minutes at a time, and that the plaintiff was a guest in a car driven by the owner thereof, and that the car collided with the obstructing train: *Held*, the violation of the ordinance is negligence *per se*, and the question of proximate cause should be submitted to the jury for its determination, and defendant's motion as of nonsuit should be denied. *Western v. R. R.*, 194 N. C., 210, cited and distinguished.

2. **Same—Contributory Negligence—Imputed Negligence—Automobiles—Guests—Railroads.**

The negligence of the owner driving an automobile at the time of its collision with a railroad train blocking the street of a town in violation of an ordinance is not ordinarily imputed to one riding in the automobile as a mere guest or invitee, but this principle is subject to modification under evidence tending to show that the owner and the guest were engaged in a joint enterprise. *Pusey v. R. R.*, 181 N. C., 137.

3. **Same—Contributory Negligence—Sole Proximate Cause.**

The plaintiff riding as the guest or mere invitee of the owner driving an automobile at the time of a collision with defendant's freight train standing across the street in violation of a town ordinance may not recover damages against the railroad company when the negligence of the driver of the automobile is the sole cause of the injury in suit.

ADAMS, J., concurs in dissenting opinion.

APPEAL by plaintiff from *Barnhill, J.*, at September Term, 1928, of MARTIN.

Civil action to recover damages for an alleged negligent injury caused by a collision between an automobile in which plaintiff was riding as a guest, and the defendant's train standing across a street in the town of Parmelee in violation of an ordinance of said town.

The evidence tends to show that on the night of 10 March, 1924, plaintiff, as an invited guest, started on an automobile trip with one Frank Donnell, owner and driver of the car, from Robersonville to Greenville to attend a show. At Parmelee, while running about 20 or 25 miles per hour, Donnell ran into a freight train belonging to the defendant, which was standing across the street, and the plaintiff was severely injured. The plaintiff had no control or authority over the automobile, but was a mere invited guest or gratuitous passenger riding therein.

An ordinance of the town of Parmelee making it unlawful for any train or engine to stand on or block any of the street crossings in said town longer than ten minutes at a time, was offered in evidence.

J. L. Gurganus, who had stopped his automobile at the crossing in question, waiting for the train to pass, testified: "We had been there approximately eight or ten minutes when the car struck. I do not know how long the train had been across the crossing before we got there, but it was there when we got there. It was raining and cold. We sat there in the car approximately eight or ten minutes and a light approached the train from the opposite direction and we heard a slam. As we heard the slam, the lights went out."

At the close of plaintiff's evidence, judgment of nonsuit was entered on motion of defendant, from which the plaintiff appeals, assigning error.

A. R. Dunning, R. L. McMillan and Biggs & Broughton for plaintiff.
Harry W. Stubbs and McLean & Rodman for defendant.

STACY, C. J., after stating the case: Under the principles announced in *White v. Realty Co.,* 182 N. C., 536, 109 S. E., 564, *Earwood v. R. R.,* 192 N. C., 27, 133 S. E., 180, and *Taylor v. Lumber Co.,* 173 N. C., 112, 91 S. E., 719 (on the question of proximate cause), we think the case should have been submitted to the jury.

The conclusion is entirely permissible and the fact readily inferable, viewing the evidence in its most favorable light for the plaintiff, that the defendant's train at the time of the collision was blocking the street in violation of the town ordinance of Parmelee which makes it unlawful for any train or engine to stand on or block any of the street crossings in said town longer than ten minutes at a time.

We have held in a number of cases that it is negligence on the part of defendant to fail to observe a positive safety requirement of the law. *Albritton v. Hill,* 190 N. C., 429, 130 S. E., 5; *Taylor v. Stewart,* 172 N. C., 203, 90 S. E., 134. And where a failure of this kind is admitted or established, it is ordinarily a question for the jury to determine whether such negligence is the proximate cause of plaintiff's injury. *Stultz v. Thomas,* 182 N. C., 470, 109 S. E., 361. But, of course, if the negligence of the driver and his fault alone were the sole proximate cause of the injury, as distinguished from a proximate cause or one of the proximate causes, then there could be no recovery against the railroad. *Earwood v. R. R., supra.*

Weston v. R. R., 194 N. C., 210, 139 S. E., 237, is distinguishable, for there the suit was by the owner and driver of the car, while here the plaintiff, a mere invited guest with no authority or control over the car, and not its owner, brings the action. Ordinarily, the negligence of the driver, under such circumstances, is not imputable to the guest or passenger. *Williams v. R. R.,* 187 N. C., 348, 121 S. E., 608 (concurring opinion); *Bagwell v. R. R.,* 167 N. C., 611, 83 S. E., 814. But this principle may be subject to modification if it should appear that the occupants of the car were engaged in a joint enterprise. *Pusey v. R. R.,* 181 N. C., 137, 106 S. E., 452.

Reversed.

CONNOR, J., dissenting: I concur in the opinion of the Court that on the trial of this action in the Superior Court there was evidence tending to show a violation by defendant of an ordinance of the town of Parmelee.

This ordinance is as follows: "It is hereby declared a nuisance for a train or engine or any part thereof of a train, to stand on or across, or block any of the street crossings or sidewalk crossings in the town of Parmelee, North Carolina, longer than ten minutes at a time, under a penalty not to exceed five dollars for each and every offense."

It is well settled by our decisions that if the jury shall find from the evidence that defendant violated this ordinance, such violation was negligence *per se*. I understand the court to hold that there was no evidence from which the jury could find that defendant was negligent in any other respect. In this I concur. The ordinance of the Highway Commission requiring that a vehicle or other obstruction left standing in the roadway at night shall be protected by proper lights, is not applicable to a car left standing by a railroad company on a public crossing at night. Defendant's negligence, consisting in its violation of the ordinance of the town of Parmelee, is not actionable, however, unless such negligence was the proximate cause of the collision which resulted in plaintiff's injuries. *Ledbetter v. English,* 166 N. C., 125, 81 S. E., 1066.

It is also well settled by our decisions that ordinarily where defendant's negligence is established by the evidence, the question as to whether such negligence was the proximate cause of the injury, is for the jury. I do not understand, however, that this is always the case. There must be evidence from which the jury may find, or at least from which it may infer a causal relation between the negligence of the defendant and the injury to the plaintiff. Whether or not there is such evidence is a question of law to be determined by the court. Notwithstanding there is evidence of defendant's negligence, if there is no evidence from which the jury may find that such negligence was the proximate cause of the injury, defendant's motion for judgment as of nonsuit under C. S., 567, should be allowed. *Peters v. Tea Co.,* 194 N. C., 172, 138 S. E., 595; *Gillis v. Transit Corp.,* 193 N. C., 346, 137 S. E., 153.

In *Leathers v. Tobacco Co.,* 144 N. C., 330, 57 S. E., 11, it is said by this Court: "While it is true that if there be any dispute regarding the manner in which the injury was sustained, or, if, upon the conceded facts, more than one inference may be fairly drawn, the question (as to whether defendant's negligence was the proximate cause of plaintiff's injury) should be left to the jury, yet it is equally well settled that where there is no dispute as to the facts, and such facts are not capable of supporting more than one inference, it is the duty of the judge to instruct the jury, as a matter of law, whether the injury was the proximate result of the negligence of defendant."

In the instant case, I am unable to see how the violation of the ordinance had any causal relation to the collision between the automobile in which plaintiff was riding, as a guest, and defendant's car which was standing on the crossing. It was not negligence for defendant to leave its car standing on the crossing; it became negligence only after the car had stood there more than ten minutes, in violation of the ordinance. The collision occurred, so far as defendant was concerned, because its car was standing on the crossing. This was not negligence. The collision did not occur because the car had been standing on the crossing for more than ten minutes, if such was the fact.

The evident purpose of the ordinance was to prohibit the blocking of street crossings by defendant, and thereby prevent its interference with the flow of traffic over said crossings. It was not the purpose of the ordinance to protect travelers on the public streets from injuries resulting from collisions with engines or cars left standing on said crossings.

I think there was no error in the judgment dismissing the action upon defendant's motion for nonsuit. I, therefore, dissent from the decision of the Court reversing the judgment of the Superior Court.

ADAMS, J., concurs in dissenting opinion.

BANK OF WINDSOR v. CLARK PEANUT COMPANY, INC., AND BIRDSONG & COMPANY, INC.

(Filed 13 March, 1929.)

Bills and Notes—Checks and Drafts—Rights and Liabilities of Banks in Course of Collection—Agency.

A bank that receives for collection drafts from the duly authorized agent of another and advances the money on them, of which the principal receives the benefit, and the drafts are not paid when presented to the drawee bank in due course for collection owing to its insolvency, the bank of deposit may maintain an action against the principal for the money so advanced, when it is found as a fact, by the trial court, to which no exception is taken, that the collecting bank was the agent of the drawee and not the owner of the drafts, on the ground that the principal is liable for the default of his agent.

APPEAL by defendants from *Midyette, J.,* at August Term, 1928, of BERTIE. Affirmed.

Action for the recovery of money paid by plaintiff to the agent of defendants, on drafts drawn by said agent on defendant, Clark Peanut Company, Inc.; said money was used by said agent for the purchase of peanuts on account of defendants, as partners. The peanuts purchased by said agent and paid for with said money were shipped to and received by defendants.

Said drafts were duly presented to Clark Peanut Company, Inc., for payment, by the United Commercial Bank, of Plymouth, N. C., agent of said Peanut Company, Inc., and paid by said company. Plaintiff, however, has not received from said United Commercial Bank of Plymouth payment for said drafts.

By consent, a trial by jury was waived, and the facts found by the court.

From judgment that plaintiff recover of defendants the money paid by it to defendants' agent, defendants appealed to the Supreme Court.

Winston & Matthews for plaintiff.
Ward & Grimes and MacLean & Rodman for defendants.

CONNOR, J. On 5 January, 1925, W. A. Tadlock, a resident of Bertie County, North Carolina, drew two drafts, one for $1,419.46, and the other for $1,922.95, both payable to the order of the Bank of Windsor, of Windsor in said county and State, the plaintiff in this action. Both said drafts were drawn on Clark Peanut Company, Inc., of Plymouth, N. C. Both were payable at sight. These drafts were delivered by the said W. A. Tadlock to the Bank of Windsor, on 6 January, 1925. The Bank of Windsor credited the account of said W. A. Tadlock with the full amount of said drafts, and thereafter charged to his account his checks, aggregating the full amount of said credit. The Bank of Windsor thus paid to W. A. Tadlock the sum of $3,342.41, the amount of said drafts.

On 7 January, 1925, the Bank of Windsor forwarded said drafts, by mail, to the National Bank of Commerce, of Norfolk, Va., which duly acknowledged receipt of same, and credited the Bank of Windsor with their amount; on 8 January, 1925, the National Bank of Commerce forwarded said drafts, by mail, to the United Commercial Bank of Plymouth, N. C., for presentment to and collection from Clark Peanut Company, Inc. On 10 January, 1925, the said drafts were duly presented for payment by the United Commercial Bank of Plymouth to Clark Peanut Company, Inc.; on said day Clark Peanut Company, Inc., delivered to said United Commercial Bank of Plymouth its checks, one for $1,419.46, and the other for $1,922.95, both drawn on said bank in payment of said drafts; the said checks were charged to the account of said Clark Peanut Company, Inc., by the said United Commercial Bank, and thereafter delivered to said Clark Peanut Company, Inc., marked "Paid." At the time said checks were charged to its account the Clark Peanut Company, Inc., had on deposit with the said bank, to its credit, a sum in excess of the amount of said checks, and the said bank had assets in cash and deposits in solvent banks, largely in excess of said amount. Upon its receipt of said checks, the United Commercial Bank delivered the said drafts, marked "Paid," to Clark Peanut Company, Inc. The Clark Peanut Company, Inc., thus paid to the United Commercial Bank of Plymouth, the drafts drawn on it by W. A. Tadlock, payable to the order of the Bank of Windsor.

On 13 January, 1925, the United Commercial Bank of Plymouth remitted to the National Bank of Commerce of Norfolk, from whom it had received said drafts for presentment and collection, by its check on the Seaboard National Bank of Norfolk, for the proceeds of said drafts. This check was duly presented for payment by the National Bank of Commerce to the Seaboard National Bank. Payment of said check was refused by the Seaboard National Bank because the drawer, United Commercial Bank of Plymouth, had no funds to its credit with the said drawee bank. The National Bank of Commerce thereupon charged the Bank of Windsor with the amount of said drafts, thus offsetting the credit which it had given said Bank of Windsor when it received said drafts. The Bank of Windsor thus has not received payment for said drafts; the amount paid by it to W. A. Tadlock, on account of said drafts, is now due and owing to the plaintiff, Bank of Windsor.

On 14 January, 1925, the United Commercial Bank of Plymouth closed its doors and ceased to do business. On said day, and for some time prior thereto, it was hopelessly insolvent. A receiver for said bank has been duly appointed.

On 6 January, 1925, the day on which the drafts drawn by W. A. Tadlock were received by the Bank of Windsor and credited to his account, the said W. A. Tadlock was the agent of the Clark Peanut Company, Inc., and as such agent was authorized to buy peanuts for said company from farmers in Bertie County. As such agent he was authorized to draw on said company for money with which to pay for peanuts bought by him for said company. The drafts drawn by W. A. Tadlock on 5 January, 1925, and deposited by him in the Bank of Windsor, on the next day thereafter, were drawn and deposited for the purpose of procuring money at Windsor with which to pay for peanuts bought by the said W. A. Tadlock for the defendants, Clark Peanut Company, Inc., and Birdsong & Company, Inc., as partners. The peanuts bought by W. A. Tadlock and paid for by him with the money procured from the Bank of Windsor on said drafts were shipped to and received by defendants.

For the purpose of providing their agent; W. A. Tadlock, with money to pay for said peanuts, defendants authorized the said W. A. Tadlock to draw the drafts, which the Bank of Windsor received as deposits from the said W. A. Tadlock, and upon which it paid him the money which it now seeks to recover. The Bank of Windsor, the National Bank of Commerce, of Norfolk, Va., and the United Commercial Bank of Plymouth were all agents of the Clark Peanut Company, Inc., for the collection of said drafts, and for the remittance of the proceeds thereof to the Bank of Windsor.

Plaintiff's right to recover in this action is determined by the finding of the court, to which there was no exception, that the collecting bank was the agent of the drawee, and not agent of the payee or owner of the drafts. Defendants, therefore, and not the plaintiff, are liable for the default of the United Commercial Bank. Plaintiff has not been paid the money which it advanced to W. A. Tadlock, agent of defendants, and which said agent used for the purchase of peanuts which were shipped to and received by defendants. There is no error in the judgment that plaintiff recover said money with interest from the defendants. The judgment is supported by the principle that a principal is liable for the default of his agent, and is

Affirmed.

G. V. KELLER v. B. F. PARRISH ET AL.

(Filed 13 March, 1929.)

1. **Mortgages—Transfer of Property Mortgaged—Liability of Mortgagor After Transfer.**

   By selling the mortgaged premises the mortgagor of lands is not relieved of his personal liability upon the note secured by the mortgage, outstanding in the hands of a holder in due course.

2. **Estoppel by Deed—Mortgages—Purchaser of Equity of Redemption.**

   The grantees of land subject to a mortgage are estopped to deny the validity of the mortgage.

3. **Mortgages—Transfer of Property Mortgaged—Liability of Purchaser of Equity of Redemption.**

   Where the grantees in a deed to lands expressly assume an existing mortgage debt thereon they become liable not only to the mortgagor, but directly to the holder of the note secured by the mortgage who has acquired it for a valuable consideration in due course.

4. **Mortgages—Foreclosure by Action—Deficiency and Personal Liability—Purchaser of Equity of Redemption—Contracts.**

   Where the purchaser of the equity of redemption in his deed expressly assumes the payment of the note secured by the mortgage, the holder of the note may enforce the payment against the purchaser of the equity of redemption personally to the extent of the deficiency after applying the proceeds of the sale upon the note, under the principle that one for whose benefit a contract is made may recover thereon.

5. Same—Rights of Mortgagee—Release—Consent of Mortgagee.

Where the purchaser of an equity of redemption assumes the payment of a prior mortgage note, an agreement between him and the mortgagor, releasing him from liability upon the reconveyance of the equity of redemption to the mortgagor, is not binding upon the holder of the mortgage note where he has not consented thereto, and his right to recover being directly upon the promise made for his benefit, the mortgagor is not a necessary party in his action to recover for the deficiency after the sale.

6. Mortgages—Foreclosure by Action—Sale—Right of Mortgagee to Bid in Property.

The holder of a note secured by a mortgage on lands may bid at a judicial sale of foreclosure under a decree of court authorizing the sale, and acquires title in the absence of fraud.

APPEAL by plaintiff from *Nunn, J.,* at February Term, 1928, of HARNETT. New trial.

On 26 December, 1919, W. H. Hatcher and wife conveyed a tract of land to E. M. Cain and wife at the price of $10,000. Cain and his wife then executed a mortgage to the Federal Land Bank of Columbia for $4,000, gave the proceeds of the loan, approximately $4,000, to Hatcher, and executed to him a second mortgage on the land to secure notes amounting to $6,000.

On 14 January, 1920, Cain and his wife conveyed the land to B. F. Parrish and N. T. Patterson, since deceased, and received therefor $1,400 in cash. This deed has the following clause: "This deed, however, is made subject to two mortgages, one made by E. M. Cain and wife to the Federal Land Bank, securing $4,100, and the other mortgage made by E. M. Cain and wife to W. H. Hatcher, securing $6,000, and both of these obligations are assumed by N. T. Patterson and B. F. Parrish, the grantees to this deed." Thereafter Hatcher endorsed to the plaintiff the notes aggregating $6,000 in part payment of the purchase price of a dairy business and the plaintiff became a holder of the notes in due course, but the mortgage was not assigned until 1 April, 1921. After the plaintiff took these notes Parrish and Patterson reconveyed the land to Cain by deed dated 2 January, 1921, which contained this clause: "And by making this conveyance said E. M. Cain assumes all liability and obligations outstanding against this land as far as the said B. F. Parrish may be liable, and releases the said B. F. Parrish from any and all obligations with reference to said land," the conveyance by Patterson's heirs containing a similar clause. In 1922 the plaintiff brought suit in Harnett County against E. M. Cain and others (neither Parrish nor Patterson's heirs being parties) to foreclose the mortgage assigned to the plaintiff by Hatcher and to restrain Cain from exercising further ownership over the land. A receiver was appointed to take charge of the farm and to carry out a contract made by Cain for the sale of timber, and a commissioner was appointed to sell the land. There was evidence of an agreement by the plaintiff that if Cain would not oppose the foreclosure and injunctive relief he would pay Cain's attorney and the costs and release Cain from all obligations on account of the indebtedness represented by the notes executed to Hatcher. There was also evidence that the plaintiff knew Cain had reassumed the obligations of Parrish and Patterson, but not that he assented thereto, or that he released Parrish from the debt he had assumed.

The object of the action was to recover of Parrish the remainder alleged to be due on the notes and to subject certain lands to execution for payment.

The verdict was as follows:

1. Did the plaintiff, G. V. Keller, acquire as a holder in due course the series of notes of E. M. Cain and wife, aggregating $6,000, secured by a mortgage of E. M. Cain and wife, to W. H. Hatcher and wife, as alleged in the complaint? Answer: Yes. (By consent.)

2. Did the defendant, B. F. Parrish, with the joinder of N. T. Patterson, by accepting the deed of E. M. Cain and wife, registered in Book 194, page 311, registry of Harnett County, assume the payment of said indebtedness as alleged in the complaint? Answer: Yes. (By consent.)

3. If so, did the defendant, B. F. Parrish, on 3 January, 1921, by his deed registered on 4 January, 1921, reconvey the mortgaged premises to E. M. Cain, and by accepting said deed did E. M. Cain assume the payment of said mortgage and contract thereby to relieve the defendant Parrish from payment of the mortgage theretofore assumed by him? Answer: Yes. (By consent.)

4. Did the plaintiff, G. V. Keller, after knowledge of the reconveyance of the mortgaged premises from Parrish to Cain, cause said land to be foreclosed by a suit instituted by him in Harnett Superior Court, in which suit the defendant, B. F. Parrish, was not made a party? Answer: Yes. (By consent.)

5. Did the plaintiff, G. V. Keller, become the last and highest bidder at said sale at the price of $1,700, for defendant Cain's equity, and have deed to the mortgaged premises executed and delivered to him and go into possession of said mortgaged premises by virtue of said deed? Answer: Yes. (By consent.)

6. Did the plaintiff, G. V. Keller, with knowledge that B. F. Parrish had reconveyed the mortgaged premises to E. M. Cain have a settlement with said E. M. Cain and relieve him from further liability upon said indebtedness as alleged in the answer? Answer: Yes.

7. Was the defendant, E. M. Cain, at the time of executing the deed to Parrish and Patterson, and at all times thereafter, insolvent? Answer: Yes. (By consent.)

8. What was the fair market value of the mortgaged premises on the date of the foreclosure sale, 5 August, 1922? Answer: $11,000.

9. What amount of rents from the land, and receipts from the sale of timber, if any, were received by plaintiff before the sale of said land in the foreclosure proceedings? Answer: $2,500.

10. Is the plaintiff's cause of action barred by the three years statute of limitations? Answer: No.

11. What amount, if any, is the plaintiff entitled to recover of the defendant, B. F. Parrish? Answer: Nothing.

Judgment for defendant. Appeal by the plaintiff upon error assigned.

J. R. Baggett and Whitlock, Dockery & Shaw for plaintiff.
Young & Young and J. C. Clifford for defendants.

ADAMS, J. By selling the mortgaged premises to Parrish and Patterson, the mortgagors, E. M. Cain and his wife, were not relieved of their personal liability on the notes which they had executed to Hatcher and which Hatcher afterwards endorsed and transferred to the plaintiff. And because they accepted their deed subject to the mortgages the grantees were estopped to deny that the mortgages were valid. They became personally liable, not only to their grantor, but directly to the holder of the notes and mortgages. *Baber v. Hanie,* 163 N. C., 588. It is therefore apparent that the question immediately confronting us is addressed to the relation existing between the several parties—the mortgagors, the purchasers of the equity of redemption, and the plaintiff who holds in due course the notes that were given to Hatcher. Is the relation to be determined by the application of legal or equitable principles?

In *Baber v. Hanie, supra,* the Court said there are two grounds for the recovery by a mortgagee from a vendee of the mortgagor of a deficiency in the mortgage debt after foreclosure: equitable subrogation and the broad principle that a third person may maintain an action on a contract made for his benefit. It was remarked that the case presented a good opportunity for the application of the latter principle, but that the decisions of the Court had not gone so far. The case was therefore decided by applying the doctrine of equitable subrogation.

It was said that the right of the mortgagee to hold the purchaser of the equity of redemption upon his agreement to assume the payment of the mortgage debt was not enforceable in an action at law upon the agreement between the mortgagor and the purchaser, but was enforceable as a collateral stipulation obtained by the mortgagor, which by equitable subrogation inured to the benefit of the mortgagee. The mortgagee's privilege being that of subrogation to the rights of the mortgagor, the mortgagee could enforce the personal liability of the purchaser only to the extent of the deficiency upon a foreclosure of the mortgaged premises—and then only if the mortgagor was himself personally liable for the mortgage debt. As between themselves the purchaser occupied the position of principal debtor and the mortgagor that of surety. In the *Baber case* four successive grantees had assumed the mortgagor's debt; and it was held that the doctrine of subrogation extended to the whole number, the last and intervening purchasers of the equity of redemption being bound, not only to the first purchaser, but to his vendor and to the mortgagee after the latter had applied to his debt the proceeds arising from a sale of the mortgaged premises.

In *Rector v. Lyda,* 180 N. C., 577, *Walker, J.,* resorted to the legal principle which he had declined to apply in *Baber v. Hanie.* The statement in *Rector's case* is to this effect: Hudson Williams, after executing to L. I. Jennings his note and mortgage to secure the payment of $2,000 conveyed the land described in the mortgage to Manly Lyda, who assumed the mortgage debt as part consideration for his purchase. Having died, Jennings and Lyda were represented by their administrators. A verdict was returned in favor of the administrator of Jennings against the administrator of Lyda and judgment was rendered for the amount demanded with interest, but the trial court, conforming to the decision in *Baber v. Hanie,* directed that no execution should issue until the mortgage was foreclosed and the amount of the deficiency ascertained. On appeal this Court modified the judgment by striking out the clause requiring foreclosure of the mortgage and held that without foreclosure the action could be maintained. It was said in the opinion that the trial judge had followed the former rule in equity, but that the action could be maintained on the broad principle that one for whose benefit a promise is made to another may maintain an action upon the promise though neither a party to the agreement nor a privy to the consideration. The deduction was that a mortgagee may maintain a personal action against a purchaser of the equity of redemption who has agreed with his grantor to pay off the incumbrance if the grantor was himself personally liable upon the mortgage debt—a deduction which is supported by the citations in the opinion and fortified by subsequent decisions. *Parlier v. Miller,* 186 N. C., 501; *Glass Co. v. Fidelity Co.,* 193 N. C., 769. See Annotation, 21 A. L. R., 413, 454. The party for whose benefit the contract is made, being the real party in interest, sues in his own right, not in that of another. Hence it was said in *Voorhees v. Porter,* 134 N. C., 591, 604, that it is immaterial whether the liability of the original debtor is continued or not. Upon this principle the plaintiff's release of the mortgagor would not of itself bar the plaintiff's right of recovery. True, the answer to the sixth issue embraces the additional finding that the plaintiff agreed to this release, knowing that Parrish had reconveyed the premises to the mortgagor; but it was held in *Rector v. Lyda, supra,* that the mortgagee could proceed directly against the grantee or purchaser in an action at law without the concurrence of the mortgagor. By virtue of his promise Parrish became the principal debtor to the mortgagee; he knew that the plaintiff was the assignee of the Hatcher notes; he reconveyed to the mortgagor without consideration. However this transaction may have affected the relation between Parrish and the mortgagor, it did not (the plaintiff not consenting) change the relation existing between Parrish and the plaintiff who, having purchased the notes upon the mortgagee's representation that Parrish was solvent, sought to enforce the right which accrued to him as the assignee of the mortgagee. Indeed, the action could have been maintained without a foreclosure of the mortgage *(Rector v. Lyda, supra); a fortiori* could it be maintained after foreclosure and the admitted insolvency of the mortgagor. After the mortgagee has accepted or acted on the faith of the contract the mortgagor and the grantee may not change or annul it in the absence of the mortgagee's consent. 41 C. J., 749, sec. 815. It follows, then, that the answer to the sixth issue is not a bar to the plaintiff's recovery.

It is contended, in the next place, that the defendant, Parrish, was a necessary party to the suit for foreclosure, but we do not concur. We must not lose sight of the plaintiff's remedy. He seeks to enforce his right against Parrish, not by a suit in equity, but by an action at law. The action could be maintained without the concurrence of the mortgagor upon the theory that Parrish's promise to pay the debt constitutes a contract between him and the mortgagor for the benefit of the plaintiff. The action is in the nature of assumpsit. The case of *Woodcock v. Bostic,* 118 N. C., 822, is explained in *Rector v. Lyda, supra.* Foreclosure and a sale of the premises was not a condition precedent to the right of the plaintiff to proceed against Parrish. 41 C. J., 750, sec. 819; 753, sec. 822. "The mortgagee, under the rule allowing a third person to sue at law upon a contract made for his benefit may sue without regard to the personal liability of the mortgagor when the grantee has promised upon a sufficient consideration to pay the debt." *Ibid.,* 755, sec. 827; *Voorhees v. Porter, supra.* Besides, Parrish reconveyed the land to Cain on 2 January, 1921; the decree of foreclosure was made on 22 May, 1922, and at this time Parrish, while liable in assumpsit on the debt, had no interest in the land. If he had previously occupied the position of mortgagor he was not a necessary defendant in the foreclosure because he had parted with his interest and upon this ground denied that he was liable to the plaintiff. *Bernard v. Shemwell,* 139 N. C., 446. As we have already pointed out, the reassumption of the debt by the mortgagor did not, in the absence of the plaintiff's consent, release the defendant from liability to the plaintiff upon his original promise.

It will be noted in reference to the eighth issue that the plaintiff did not acquire title to the land by purchasing at his own sale, but at a judicial sale at which he was authorized to bid by the decree of foreclosure, and fraud in conducting the sale was neither proved nor alleged. For the errors complained of there must be a

New trial.

ETHEL MILLER, ADMINISTRATRIX OF M. D. MILLER, v. GHERMAN C. HOLLAND.

(Filed 13 March, 1929.)

Negligence—Acts or Omissions Constituting Negligence In General.

No presumption of negligence is raised by the fact alone that an accident has occurred, and it is required that the plaintiff in his action for actionable negligence show by his evidence that the defendant breached some duty owed to the plaintiff's intestate and that such breach was the proximate cause of the injury, and upon failure of the plaintiff to introduce evidence tending to show all of the elements of injury, negligence and proximate cause, a motion as of nonsuit is properly allowed.

APPEAL by plaintiff from *Nunn, J.*, at December Term, 1928, of CARTERET. Affirmed.

E. H. Gorham for plaintiff.
C. R. Wheatley and J. F. Duncan for defendant.

PER CURIAM. The plaintiff brought suit to recover damages for the death of her intestate, alleged to have been caused by the negligence of the defendant. The controversy was directed chiefly to the allegation that after the intestate, who was riding a bicycle, had crossed the bridge and causeway between Beaufort and Morehead City he was struck by an automobile driven by the defendant, thrown from his bicycle, and instantly killed. The defendant denied this allegation and set up as a defense not only that the defendant was not negligent, but that the intestate negligently ran his bicycle upon the defendant's car and thus brought about his own injury and death. At the close of the evidence, the defendant's motion to dismiss the action as in case of nonsuit was allowed, judgment was given for the defendant, and the plaintiff excepted and appealed.

It has been held that no inference of negligence is to be drawn from the fact of an injury, and that no presumption of negligence is raised merely because an accident has occurred. *Isley v. Bridge Co.,* 141 N. C., 220. To constitute actionable negligence there must be not only a want of due care, but such want of care must involve a breach of some duty owed to the person who is injured in consequence of such breach. Injury, negligence and proximate cause are essential elements. *Whitt v. Rand,* 187 N. C., 805. We have carefully read the record and concur in his Honor's conclusion. Evidence introduced by the plaintiff, the defendant having offered none, is not sufficient to establish a case of actionable negligence. In fact the evidence of negligence on the part of the intestate is no less convincing than that of negligence on the part of defendant. It was insisted by the defense that the intestate in some way unfortunately ran his bicycle against the defendant's automobile and that the collision was the proximate cause of the intestate's injury.

We have examined the plaintiff's exceptions to his Honor's ruling upon the admission and rejection of evidence and find them to be without merit. The questions either involve matters within the province of a jury, or omit essential elements, or include others which should have been omitted. The judgment is

Affirmed.

STATE v. J. E. DEBNAM.

(Filed 13 March, 1929.)

Municipal Corporations — Municipal Officers — Official Act for Private Pecuniary Advantage—Private Financial Gain Necessary to Offense.

A member of the board of education of a county is not guilty under the provisions of C. S., 4390, for voting as such member for the purchase of school buses from a company selling them owned by his wife, and in which he had no pecuniary interest and for which he worked upon a salary, when the sale was made by other agents of the company upon a commission basis.

APPEAL by the State from *Nunn, J.,* at December Term, 1928, of GREENE.

The defendant was indicted for a breach of C. S., 4390, the material parts of which, the State admits in its brief, are as follows: "If any member of any board of education shall have any pecuniary interest, either directly or indirectly, proximately or remotely, in supplying any goods, wares or merchandise of any nature or kind, whatsoever, for any of said schools; or if any of such officers shall act as agent of any merchant or dealer for any article of merchandise, to be used by any of said schools, he shall be deemed guilty of a misdemeanor, etc."

The jury returned the following special verdict:

1. That the defendant is a member and chairman of the board of education of Greene County.

2. That the defendant is manager of the Debnam Motor Company.

3. That the Debnam Motor Company is owned solely and exclusively by Mrs. Birdie Debnam, wife of the defendant.

4. That the defendant has no pecuniary or financial interest in the Debnam Motor Company, but works for said Debnam Motor Company on a monthly salary just as do the other employees of said company.

5. That the Debnam Motor Company, through Ray Chestnutt and H. E. Thorne, working on commission, sold to the board of education several school trucks.

6. That the county vouchers for said school trucks were payable to said Chestnutt and Thorne, were by them endorsed to the Debnam Motor Company, and became the property of said company.

7. That at said time the Debnam Motor Company was selling Ford trucks.

Upon this special verdict the defendant was adjudged "not guilty," and the State excepted and appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. Paul Frizzelle for defendant.

PER CURIAM. The material charge in the indictment is this: That the defendant unlawfully and wilfully, while acting in the capacity of a member of the county board of education, voted for and authorized the purchase of school trucks, etc., from the Debnam Motor Company, a partnership, in which the defendant owned a pecuniary and financial interest. It will be noted that there is no allegation or charge in the indictment that the defendant acted in the capacity of agent for the Debnam Motor Company. The special verdict expressly finds that the defendant has no pecuniary or financial interest in the motor company, but is an employee engaged at a monthly salary. It is perfectly evident that under these circumstances the defendant was properly held to be "not guilty" upon the bill of indictment. Judgment

Affirmed.

IN RE WILL OF E. C. CARRAWAY, DECEASED.

(Filed 13 March, 1929.)

Appeal and Error—Review—Harmless Error.

Where the jury upon sufficient evidence has answered the issues upon the caveat to a will sufficient to establish it as the last will and testament of the testator, the answer of the judge to another issue as a matter of law that the paper-writing and each and every part thereof was the last will and testament of the testator if erroneous, will not be considered as material or prejudicial error.

STACY, C. J., dissenting.

APPEAL by caveators to will of E. C. Carraway, tried before *Grady, J.*, and a jury, at November Term, 1928, of LENOIR. No error.

E. C. Carraway, being sick with the "flu," on 12 October, 1918, executed in his own handwriting a paper-writing, on an attached leaf in an account book containing accounts and other writing, in words and figures as follows: "I will to Gordon B. Carraway all my property on earth personal & real estate. I appoint J. H. Mewborn as executor without bond. I am sound mintly and physically. This the 12 Oct. 1918. E. C. Carraway (Seal)."

A witness testified: "He asked me to get him his account book, and his pen and ink. He was in bed and nobody was in the room with him but me. After I gave him the book he wrote some in the book I gave him. After he had written in the book he gave it to me and told me to put it in the bureau drawer, and I put it in there. In that drawer where I put the book he kept bills and other things, papers of his and things of that kind. After I put the book in the drawer I locked it. He kept the key to the drawer. It was the drawer he kept his valuable papers in."

E. C. Carraway died the following day, after making the will. Gordon B. Carraway was his brother. The caveat to this will was filed on 13 October, 1925.

The real estate devised by the will to Gordon B. Carraway was known as "Monticello," the home place of the late W. W. Carraway in Lenoir County, N. C.

A witness testified: "I think probably there is 150 acres in this plantation of E. C. Carraway's. It was the original homestead of the family. At the time of this will it was worth $150 or $200 per acre—a valuable farm. The finest farm in the county, I think. It is in Vance Township. It is the most beautiful spot in the county. This farm is now owned by a widow, Mrs. Hattie Scarboro."

The issues submitted to the jury, and their answers thereto, were as follows:

"1. Is the paper-writing offered for probate and each and every part thereof in the genuine handwriting of E. C. Carraway, deceased? Answer: Yes.

2. Was the paper-writing found among the valuable papers and effects of the deceased? Answer: Yes.

3. At the time of the execution of said paper-writing, did E. C. Carraway have sufficient mental capacity to make a will? Answer: Yes.

4. Was the execution of said paper-writing procured by undue influence as alleged by the caveators? Answer: No.

5. Is the said paper-writing and each and every part thereof the last will and testament of E. C. Carraway? Answer: …………, and the court having instructed the jury that they need not answer the fifth issue, and the court, upon the coming in of the verdict having answered the fifth issue Yes, as a matter of law upon the answers of the jury to the other issues."

Sutton & Greene for propounders.
Rouse & Rouse for caveators.

Per Curiam. After carefully reading the entire evidence, we think it sufficient and ample on all the issues to have been submitted to the jury to establish a holograph will under the decisions of this Court. The caveators introduced no evidence. The credibility of the evidence was for the jury to determine. We can see no error in the charge of the court below on all the issues. The jury having answered the first four issues in favor of propounders, it follows as a matter of course that the paper-writing and each and every part thereof was the last will and testament of E. C. Carraway.

Upon the coming in of the verdict and the jury having answered the first four issues in favor of the propounders, the court below as a matter of law answered the fifth issue "Yes." Conceding, but not deciding, that this was error, it was not material or prejudicial. On the whole record we find

No error.

Stacy, C. J., dissenting.

GARYSBURG MANUFACTURING COMPANY v. BOARD OF COMMISSIONERS OF THE COUNTY OF PENDER.

(Filed 20 March, 1929.)

1. **Taxation—Levy and Assessment—Mode of Assessment of Corporate Stock, Property or Receipts—State Board of Assessment—Recovery of Tax Paid—Procedure.**

Where a corporation under the provisions of the Machinery Act, Public Laws of 1925, ch. 102, submits its report to the State Board of Assessment and the board in accordance with the statute certifies to the register of deeds of the county where the property is situated the corporate excess liable for local taxation, the exclusive remedy of the corporation if dissatisfied with the report of the board is to file exceptions with the board in accordance with the statute, with the right of appeal from the board upon a hearing by it, and the corporation may not pay the tax under protest and seek to recover it under the provisions of C. S., 7979.

2. **Same—State Board of Assessment—Quasi-Judicial Functions.**

The State Board of Assessment exercises a *quasi*-judicial function in settling an account on valuation of corporate property liable for local taxation, and the method provided by the statute for assessment and appeal from the assessment in the exercise of this function is constitutional and must be followed, and, *Held*, in the instant case the Board of Assesment reported results of the appraisement and did not report the individual items upon which the appraisement was made, and the appraisement of the value of the stock held in a foreign corporation was not so separated from the other property as to permit a variation of this rule.

APPEAL by defendant, board of commissioners of the county of Pender, from *Sinclair, J.*, at May Term, 1928, of PENDER. Reversed.

It was agreed that a jury trial be waived and that the court below find the facts and enter the judgment thereon, out of term and out of the county of Pender.

The plaintiff, the Garysburg Manufacturing Company, is a corporation organized under the laws of the State of North Carolina, with its principal place of business at Burgaw, in the county of Pender, at which place it was conducting a lumber manufacturing establishment. Having practically sawed up all of its timber holdings in North Carolina, it organized a South Carolina corporation, called the Argent Lumber Company, with its principal office and place of business in the town of Hardeeville, South Carolina, in the county of Jasper, in that State.

The Argent Lumber Company was organized and is owned by the same stockholders as the Garysburg Manufacturing Company—$225,000 of the assets of the North Carolina company were invested in the capital stock of the South Carolina corporation. The South Carolina corporation is located where it had timber holdings, mill, etc.

The plaintiff, Garysburg Manufacturing Company, was such a corporation as was required by section 12, Machinery Act of 1925, Public Laws, ch. 102, to make reports to the State Board of Assessment, in order that that body might estimate and fix the value of the property belonging to such corporation, in accordance with the provisions of that section. It did make such report and, after considering the report, the State Board of Assessment, acting under section 15 of the Machinery Act of 1925, certified to the register of deeds of Pender County, the corporation excess of the plaintiff, the Garysburg Manufacturing Company, for local taxation at $210,243. In doing so, the State Board of Assessment estimated the value of the stock owned by the plaintiff in the Argent Lumber Company and included such value in the total amount of the value of the capital stock of the plaintiff from which deductions were made in accordance with the requirements of said section 12, and certified the result as hereinbefore stated to the register of deeds. The plaintiff, Garysburg Manufacturing Company, failed or refused to pursue the remedy for the correction of such assessment, if illegal or erroneous, provided specifically in said section 12. Instead, it voluntarily permitted such assessment to stand and contented itself with paying the taxes under protest to the county of Pender and brought proceedings to recover it back under C. S., 7979.

The amount of said taxation, found by the court below, to have been illegally collected was $5,676.56, together with a penalty for delayed payment at 1½% (see section 78 of the Revenue Act of 1925), amounting to $84.14, making a total amount of $5,760.70, with interest on the amount from the date of payment, 30 April, 1927. From this judgment the defendant, the county of Pender, appealed to the Supreme Court.

F. S. Spruill and Rountree & Carr for plaintiff.
C. E. McCullen for board of commissioners of Pender County.
Attorney-General Brummitt and Assistant Attorney-General Nash as amicus curiæ.

CLARKSON, J. Was the plaintiff mistaken in its remedy in proceeding under C. S., 7979, instead of under the method provided in chapter 102, section 12, Public Laws of North Carolina, 1925? We think so.

We think the law applicable to this controversy: section 12, chapter 102, Public Laws of 1925, pp. 215-16, in part, is as follows: "*Provided,* that if the State Board of Assessment or either of them is not satisfied with the appraisement and valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof, based upon the facts contained in the report herein required or upon any information within their possession, and to settle an account on the valuation so made by them for taxes, penalties, and interest due the

State thereon, of which such settlement immediate notice shall be given to such corporation by said State Board of Assessment, *with the right to the company dissatisfied with any settlement so made against it to appeal to the Superior Court in term time of the county in which such company has its principal place of business in this State, and thence to the Supreme Court of this State;* but before such company shall be allowed to exercise the right of appeal it shall, within twenty days after notice of such settlement, file with the State Board of Assessment exceptions to the particulars to which it objects, and the grounds thereof, and said State Board of Assessment shall hear said exceptions, after ten days notice of such hearing given by said State Board of Assessment to said company; and if they shall overrule any of said exceptions, then such company, if it desires to appeal to said Superior Court, shall within ten days thereafter give notice to said State Board of Assessment of such appeal to said Superior Court, and the State Board of Assessment shall thereupon transmit to said Superior Court a record of said settlement, with the exceptions of the company thereto, and all decisions thereon, and all papers and evidence considered in making said decision. The said cause shall be placed on the civil docket of said Superior Court, and shall have precedence of all civil actions, and shall be tried under the same rules and regulations as are prescribed for the trial of other civil causes. The cause shall be entitled 'State of North Carolina on the relation of State Board of Assessment against such company.' Either party may appeal to the Supreme Court from the judgment of the Superior Court under the same rules and regulations as are prescribed by law for other appeals, except that the State of North Carolina, if it shall appeal shall not be required to give an undertaking or make any deposit to secure the cost of such appeal," etc.

In compliance with this provision and the Revenue Act provisions, the Garysburg Manufacturing Company (chapter 101, section 89, Revenue Act, 1925, and chapter 102, section 12, Machinery Act, 1925), as of 1 May, 1926, made its report. It gave a detailed statement as required by the act. In the report we find:

(29)	*Actual value* in cash of capital stock as of May, 1926 (cash value, not book value)		$350,000
(33)	Assessed value of real property listed with local assessors	$ 21,155	
(34)	Assessed value of personal property listed with local assessors	118,602	
			139,757
			$210,243

From this report made by the Garysburg Manufacturing Company, the corporate excess was $210,243.00—this exact amount was found by the Board of Assessment the valuation liable for tax, and this amount under the law (section 15) was certified to the register of deeds of Pender County. The county levied a tax at the rate of $2.70 on the $100, amounting to a total of $5,676.56. Plaintiff paid same under protest in writing, contending that C. S., 7979, was applicable and brought this action under said provision to recover same.

The method of taxation here pursued has long been the policy of the legislative branch in this jurisdiction and held to be constitutional. *Person v. Watts,* 184 N. C., 499.

In the present case the State Board of Assessment accepted as correct the returns of the Garysburg Manufacturing Company, that the actual value in cash of capital stock as of 1 May, 1926, was $350,000. This included the stock in the Argent Lumber Company held by it, amounting to $225,000. By its detail report, carefully made, the Garysburg Manufacturing Company admitted that this stock was a part of its capital stock. In fact, it did represent its profits from its lumber enterprise in that community. At the time it made its report the law it now questions was operative. If the company was dissatisfied with any assessment, it had a forum—the remedy clearly fixed by statute as above shown, not C. S., 7979, with the right to be heard before the State Board of Assessment for any irregularities or any illegal assessment, and an appeal provided for to the Superior Court and Supreme Court, and full notice given in compliance with the Fourteenth Amendment to the Constitution of the United States.

In *Manufacturing Co. v. Commissioners,* 189 N. C., at pp. 103, 104, the matter is fully set forth as follows: "From a consideration of these and other pertinent provisions of the law, it is clear, in our opinion, that the State Board of Assessment is given supervisory powers to correct improper assessments on the part of the local boards and that on complaint made in apt time and on notice duly given and on sufficient and proper proof before this State Board, plaintiff could have obtained or had full opportunity to obtain the relief he now seeks. This being true, the judgment of his Honor sustaining the demurrer must be upheld, for it is the accepted position that a taxpayer is not allowed to resort to the courts in cases of this character until he has pursued and exhausted the remedies provided before the duly constituted administrative boards having such matters in charge. *Gorham v. Mfg. Co.,* Current Supreme Court Reporter, U. S., pp. 80, 81; *First National Bank v. Weld,* 264 U. S., p. 450; *Farmcomb v. Denver,* 252 U. S., p. 7. In *Gorham's case, Associate Justice Sanford* states the controlling principle as follows: 'We are of opinion that without reference to the constitutional questions, the bill was properly dismissed because of the failure of the company to avail itself of the administrative remedy provided by the statute for the revision and correction of the tax. A taxpayer who does not exhaust the remedy provided before an administrative board to secure the correct assessment of a tax cannot be heard by a judicial tribunal to assert its invalidity.' Our State decisions to the extent they have dealt with the subject are in full approval of the principle, holding that a taxpayer must not only resort to the remedies that the Legislature has established, but that he must do so at the time and in the manner that the statutes and proper regulations provide. *R. R. v. Commissioners,* 188 N. C., p. 265; *Wolfenden v. Commissioners,* 152 N. C., p. 83; *Commissioners v. Murphy,* 107 N. C., p. 36; *Wade v. Commissioners,* 74 N. C., p. 81." *Lumber Co. v. Smith,* 146 N. C., 199; *Land Co. v. Smith,* 151 N. C., 70; *Hart v. Commissioners,* 192 N. C., 161; *Whitley v. Washington,* 193 N. C., 240; *Caldwell Co. v. Doughton,* 195 N. C., 62; *Stanley v. Supervisors,* 121 U. S., 535, at p. 550; *Western Union Tel. Co. v. Missouri,* 190 U. S., 412, at p. 426; *English v. Arizona,* 214 U. S., 359.

In all the authorities it is distinctly held that a particular board, such as is the State Board of Assessment, given authority to assess or fix the value of property for taxation, is exercising a *quasi*-judicial function and, when the method is provided by statute for appeal from the exercise of this function and the taxpayer fails to avail himself of it, he cannot bring an action to recover back that portion of the taxes, so assessed, which he claims to be illegal. In the instant case, the Board of Assessment reported results of the appraisement and did not report the individual items upon which the appraisement was made, consequently, in this sense, the appraisement of the value of the stock held in a foreign corporation was not so separated from the other property as to permit a variation of this rule. *First National Bank v. Weld County,* 264 U. S., 450. For the reasons given, the judgment below is

Reversed.

WELLINGTON-SEARS & COMPANY v. DIZE AWNING AND TENT COMPANY.

(Filed 20 March, 1929.)

1. Contracts—Construction and Operation—General Rules of Construction.

If a contract is susceptible of two constructions, one of which will make it enforceable and the other unenforceable, the former construction will generally be preferred.

2. Same.

If an instrument is susceptible of two constructions, one of which makes it an executory contract and the other an option, the latter will be rejected because by the other construction mutual rights are conferred.

3. Contracts—Requisites and Validity—Consideration—Executory Contracts—Mutual Promises.

Where an executory contract contains several promissory covenants on both sides, it is not necessary that each promise on one side be supported by an obligation or promise on the other if it is a part of an entire contract which is supported by sufficient consideration.

4. Same—Covenants Not To Sue—Terms of Credit.

Where there is a contract for the sale of certain goods at a stipulated price with the provision that if the production of the mill manufacturing them should be curtailed by strikes or unavoidable cause, deliveries thereunder were to be made in proportion to production, with further agreements that delay or defect in quality in any delivery should not be cause for canceling any portion of the contract other than the delivery in question, and that the contract should be subject to regulation by the seller of the amount of credit to be extended: *Held*, the contract is entire and supported by sufficient consideration, and is binding on both parties.

APPEAL by defendant from *MacRae, Special Judge,* at May Term, 1928, of FORSYTH. Affirmed.

The parties duly executed the following paper:

No. 3011.

Office of

WELLINGTON-SEARS & Co.

93 Franklin St., Boston. 66 Worth St., New York.

Sold to Dize Awning & Tent Company, Winston-Salem, N. C.

About fifty thousand (50,000) Yds. 30-in. 8.42 oz. Army Duck.

Price. 25¼c per yard.

Terms: 2% 10 days net 60—FOB Mill, actual freight allowed to destination not exceeding $1 per cwt.

Delivery: Specifications to be furnished by 15 November, 1925, for shipment not later than 27 February, 1926.

Shipping Directions: Dize Awning & Tent Co., Winston-Salem, N. C.

If the production of the mill making these goods shall be curtailed during the life of this contract by strikes, lockouts or any unavoidable cause, deliveries shall be made and accepted in proportion to the production. Buyer agrees that delay, or defect in quality, in any delivery shall be no cause for canceling any portion of this contract, other than the delivery in question. It is expressly agreed that this order is subject to regulation by the seller of the amount of credit to be extended hereunder.

Accepted: WELLINGTON-SEARS & COMPANY.
By (S) J. W. Proctor.
(S) Dize Awning & Tent Co.
(S) E. G. Dize.

Boston, 24 October, 1925.

The plaintiff brought suit upon the defendant's failure to comply with the contract, setting up two causes of action, one under the law of the forum, and the other under the law of what is claimed to be the place of the contract—*i. e.,* the Commonwealth of Massachusetts. It is alleged in the complaint that the defendant accepted and paid for 9,813 yards of army duck and refused to accept and pay for 40,187 yards, and that by reason of this refusal and the decline in the market price the plaintiff suffered a loss of $2,712.62. The plaintiff asks judgment for this amount with interest from 18 October, 1926.

The action was brought in the Forsyth County court, and after the jury had been empaneled the defendant demurred *ore tenus* to the complaint on the following grounds: (1) The paper-writing sued on does not constitute a contract binding upon the defendants for the reason that the specification of the amount of goods to be purchased is too indefinite to be enforceable. (2) The following provisions made the contract void for want of mutuality: (a) "If the production of the mill making these goods shall be curtailed during the life of this contract, by strikes, lockouts, or any unavoidable cause, delivery shall be made and accepted in proportion to the production. (b) Buyer agrees that delay or defect in quality in any delivery shall be no cause for canceling any portion of this contract other than the delivery in question. (c) It is expressly agreed that this order is subject to regulation by the seller of the amount of credit to be extended hereunder." (3) If the paper-writing is a contract governed by the law of Massachusetts, the plaintiff's remedy is under section 52, paragraph 3, chapter 106 of the General Laws 1921 of that Commonwealth, and it appears upon the face of the pleadings that the plaintiff has elected to bring suit under section 54 for rescission. On the plaintiff's appeal to the Superior Court the judgment of the county court was reversed and the cause was remanded for trial. The defendant excepted and appealed.

J. E. Alexander and L. M. Butler for plaintiff.
Ratcliff, Hudson & Ferrell for defendant.

ADAMS, J. The appellant has abandoned all assigned grounds of demurrer except its position in reference to the last two sentences (b and c) in the written instrument which is the subject of the controversy. It is contended that these clauses make the plaintiff's promise illusory; that the plaintiff reserved complete protection against total nonperformance on its part; and that it retained the privilege of refusing to make any shipment to the defendant unless it chose to extend credit upon its own terms. To these contentions the appellant seeks to apply the principle that where a contract consists only of mutual promises there must be mutuality of obligation, and that where performance is dependent upon the will of one party the purported agreement does not constitute a contract. We do not concur in this interpretation.

If a contract is susceptible of two constructions one of which will make it enforceable and the other unenforceable, the former construction will generally be preferred. *Torrey v. Cannon,* 171 N. C., 519; *Edwards v. Ins. Co.,* 173 N. C., 614. And as between two possible constructions, one of which makes the instrument an executory contract and the other an option the latter will be rejected because by the other construction mutual rights are conferred upon the contracting parties. 4 Page on Contracts, sec. 2050.

Mutuality of promises means that promises to be enforceable must each impose a legal liability upon the promisor. Each promise then becomes a consideration for the other. Want of mutuality is merely one form of want of consideration. But a single consideration may support several promises; it is not necessary that each promise have a separate consideration. Hence, a covenant which imposes obligations upon one party only may be enforceable if it is part of an entire contract which is supported by a sufficient consideration. 1 Page on Contracts, secs. 525, 565 *et seq.;* 1 Williston on Contracts, sec. 141.

The paper is not lacking in mutuality of consideration. Mutuality of promises is manifest. The plaintiff contracts to sell to the defendant 50,000 yards of army duck on certain terms, and the defendant contracts to accept the goods and to pay the price. The parties evidently did not contemplate a shipment of all the goods at one time or in one bulk. The specifications were to be furnished by 15 November, 1925, so that the goods might be shipped not later than 27 February, 1926. One shipment was made 30 December, 1925, and another 5 January, 1926. The words "any delivery" imply the possibility of more than one shipment. To meet this situation the defendant agreed that delay or defect in quality in a single delivery of the duck should not be cause for cancellation of the entire contract, or a cause of action for breach of the entire contract; but he did not contract against his right to bring suit for any loss caused by the plaintiff's delay in making "the delivery in question," or by any defect in the quality of the goods.

This agreement is not a discharge of the plaintiff from liability for breach of his contract; it is not a covenant not to sue. Nor is it a unilateral promise similar to that in *Rankin v. Mitchem,* 141 N. C., 277. There the contested claim was held to be unilateral because it was not intended to bind the defendant and did not purport to impose upon him any obligation; but here the obligation assumed by the defendant is only a part of an entire contract which is supported by a valuable consideration. The contract does not, as we understand it, confer upon the plaintiff an unlimited right to determine the nature or extent of his performance so as to make his promise illusory. He is bound by the terms of his contract and is liable in damages for its breach. *Forbes v. Mill Co.,* 195 N. C., 51.

The sentence relating to the extension of credit must be construed in connection with other parts of the contract. If, as we have said, the parties contemplated the probable delivery of the goods in installments, a stipulation that the seller should regulate or limit the amount of the unpaid installments would not avoid the contract or render it unenforceable; and this, we apprehend, is as distinctly one of the purposes of the provision as a desire to guard against the possible intervening insolvency of the debtor. *Slater v. Refining Corporation,* 110 S. E. (Ga.), 759; *Mendel v. Converse & Co.,* 118 S. E., (Ga.), 587, 879; *Seed Co. v. Jennette Bros.,* 195 N. C., 173.

The judgment of the Superior Court overruling the demurrer is
Affirmed.

THE STATE BOARD OF CHARITIES AND PUBLIC WELFARE ET AL. v. HIGHLAND HOSPITAL, INC., AND DR. ROBERT S. CARROLL.

(Filed 20 March, 1929.)

1. **Hospitals—Private Hospitals—Actions to Revoke License—Parties—Demurrer.**

Where an action is brought by the State Board of Charities and Public Welfare to vacate and annul a license it had issued for the maintenance and operation of a private hospital for the insane, on the ground of immorality and cruelty of its principal owner or manager, in which the manager is joined, a demurrer of the individual is properly sustained.

2. **Same—Issues—Mistrial.**

Where there is allegation and evidence, in an action to annul and revoke the license of a private hospital for the insane, that immorality had been practiced among its employees by the manager and principal owner, and also cruel treatment had been used towards the patients by him, with separate issues as to each class of offense submitted to the jury, and the jury renders a partial verdict by leaving unanswered the issue as to gross immorality, the action of the court in directing a mistrial and refusing to sign judgment for defendant is not erroneous.

APPEALS by plaintiffs and defendant, Highland Hospital, from *Harris, J.*, at November-December Term, 1928, of WAKE.

Proceeding under C. S., 6219, to vacate and annul license to operate private hospital for cure of insane, granted by State Board of Charities and Public Welfare to Highland Hospital, Inc., of Asheville, N. C.

Annulment of the corporate defendant's license is sought on the alleged ground of gross immorality with certain patients and nurses on the part of Dr. Robert S. Carroll, principal owner, manager and medical director of said hospital.

By amendment to the original complaint, it is further alleged that the defendants have been guilty of gross neglect and cruelty in the operation of said hospital, for which it is also sought to annul the license of the corporate defendant, Highland Hospital, Inc.

A demurrer was interposed by the individual defendant, Dr. Robert S. Carroll, on the ground that the complaint does not state facts sufficient to constitute a cause of action against him. The demurrer was sustained, and plaintiffs gave notice of appeal.

The action against the corporate defendant proceeded to trial, and four issues were submitted to the jury, as follows:

"1. Are plaintiffs estopped on the cause of action set out in the original complaint by the verdict and judgment of the Superior Court of Buncombe County, as alleged in the answer? Answer: No.

"2. Was Dr. Robert S. Carroll guilty of gross immorality while medical director and manager of Highland Hospital, as alleged in the complaint? Answer: ....

"3. Was Dr. Robert S. Carroll, medical director and manager of Highland Hospital, guilty of gross neglect in the conduct and operation of said hospital, as alleged in the complaint? Answer: No.

"4. Was Dr. Robert S. Carroll, medical director and manager of Highland Hospital, guilty of cruelty in the conduct and operation of said hospital, as alleged in the amended complaint? Answer: No."

The following is taken from page 15 of the record:

"The jury, after deliberating for some time, came into court and reported to the court that they had agreed on their answers to the first, third and fourth issues, and had answered each of said issues No, as the same is shown by the record, being the issues and answers thereto as delivered to the court and filed with the clerk. Thereupon, the defendant, Highland Hospital, Inc., moved for judgment upon the answers of the jury to the third and fourth issues. The jury failed to answer the second issue. The court was of the opinion as a matter of law that it could not render judgment as prayed inasmuch as the jury did not answer the second issue, and for this cause refused the motions of the defendant for judgment upon the third and fourth issues." (Exception by defendant and notice of appeal.)

"The jury not having answered the second issue, the plaintiff moved the court that a mistrial be ordered, as to all the issues, and the court being of the opinion that the jury not having answered the second issue, a mistrial should be ordered as a matter of law, did so order and caused a juror to be withdrawn and a mistrial had." (Exception by defendant and notice of appeal.)

Again, on page 42 of the record, the following appears:

"The jury not having answered the second issue, the plaintiffs moved the court that a mistrial be ordered as to all the issues, and the court, being of the opinion that the jury not having answered the second issue, a mistrial should be ordered as a matter of law, did so order and caused a juror to be withdrawn and a mistrial had.

"To this action of the court the defendant, in apt time, duly excepted and appealed."

Both sides, plaintiffs and the corporate defendant, have perfected their appeals.

Attorney-General Brummitt, Assistant Attorneys-General Nash and Siler, William B. Jones and R. L. McMillan for State Board of Charities and Public Welfare et al.

J. C. Martin, Mark W. Brown, R. N. Simms and Josiah W. Bailey for defendants.

PLAINTIFFS' APPEAL.

STACY, C. J., after stating the case: The complaint does not state facts sufficient to constitute a cause of action against the individual defendant, Dr. Robert S. Carroll, hence the demurrer interposed by him was properly sustained. The license of the corporate defendant alone is sought to be vacated or annulled. And we may add, that by the same token, the court's ruling on the corporate defendant's plea of *res judicata* would seem to be correct, though this question is not now before us for decision.

Affirmed.

DEFENDANTS' APPEAL.

STACY, C. J. As we interpret the record, the court did not accept or undertake to accept, as part of a verdict, the jury's agreement on the first, third and fourth issues, for it is stated in two places in the case on appeal that a juror was withdrawn and a mistrial ordered. Hence, the power of the court, in a proceeding like the present, to accept a partial verdict, conclusive of some of the mooted questions, but not fully determinative of the issue involved, is not presented for decision.

In this view of the matter the defendant's appeal must be dismissed. *Cement Co. v. Phillips,* 182 N. C., 437, 109 S. E., 257.

Appeal dismissed.

FRANK K. ELLINGTON AND ELIZABETH W. ELLINGTON, GUARDIAN OF BETTY W. ELLINGTON, v. THE RALEIGH SAVINGS BANK AND TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE WILL OF FRANK K. ELLINGTON, ET AL.

(Filed 20 March, 1929.)

Wills—Construction—General Rules of Construction—Intent of Testator.

In the absence of some controlling rule of law or public policy, a will and codicils thereto will be construed to give effect to the intent of the testator to be gathered from the several related instruments considered as an entire whole.

APPEAL by defendant, Raleigh Savings Bank and Trust Company, from *Harris, J.,* at October Term, 1928, of WAKE.

Civil action to obtain a construction of the will of Frank K. Ellington. From the judgment rendered, the Raleigh Savings Bank and Trust Company, executor and trustee, appeals, assigning errors.

Murray Allen for plaintiffs.
Thomas H. Calvert for defendant bank.

STACY, C. J. The guiding star in the interpretation of wills, to which all rules must bend, unless contrary to some rule of law or public policy, is the intent of the testator, and this is to be ascertained from the four corners of the will, considering for the purpose the will and any codicil or codicils as constituting but one instrument. 28 R. C. L., 211, *et seq.*

Viewing the record in the light of these principles, a majority of the Court is of opinion that the judgment rendered by his Honor below places a permissible construction on the will and codicil in question, and that no sufficient reason has been made to appear for overturning the judgment. Two members of the Court, however, hold a contrary opinion.

Much could be said and written on both sides of the question, without any great benefit to the profession, perhaps, as the case simply calls for the application of settled principles to a peculiar use of language, not likely to appear again, and in this view of the matter we deem it sufficient to say that the judgment is

Affirmed.

IN THE MATTER OF ASSESSMENT AGAINST PROPERTY OF SOUTHERN RAILWAY COMPANY FOR PAVING ON RAILROAD STREET, KERNERSVILLE, NORTH CAROLINA.

(Filed 20 March, 1929.)

1. **Adverse Possession—Nature and Requisites—Municipal Corporations —Railroads.**

   An incorporated city or town may obtain title to streets located upon the right of way of a railroad company by long and continuous, open, and adverse use thereof for such purpose, and where the city has so used the land for a long period of time there is a presumption of an original condemnation by the city under its charter or general statute, and just compensation paid therefor, and C. S., 434, relating to the acquisition of railroad rights of way by adverse possession in certain instances, has no application as to the rights of municipalities to acquire the land.

2. **Municipal Corporations—Public Improvements—Assessments Therefor—Railroads.**

   Where a municipality by sufficient adverse use has acquired title to a street within the original grant of right of way to a railroad company, the property along it within the boundary of such street belonging to the railroad company is liable to assessment for paving and street improvements as provided by statute.

3. **Estoppel—Equitable Estoppel—Grounds of Estoppel—Municipal Corporations—Public Improvements.**

   Where an incorporated city or town has for a long period of time occupied a part of a railroad right of way as a city street, and the railroad company has previous notice that the municipality would put permanent improvements upon the street and assess the abutting owners thereon, the railroad company may not wait until after the improvements are made and then successfully resist the payment of the assessment against the property on the ground that the municipality was not the owner of the street, the doctrine of equitable estoppel applying.

4. **Trial—Trial by Court Under Agreement—Findings of Fact.**

   Where the parties to an action agree that the judge pass upon the evidence and find the facts involved, his findings have the same force and effect as the verdict of the jury would have had upon issues submitted.

APPEAL by defendant, Southern Railway Company, from *Lyon, Emergency Judge,* at September Term, 1927, of FORSYTH. Affirmed.

The judgment in the court below is as follows:

"This cause coming regularly on to be heard before me at the civil term of the Superior Court of Forsyth County, beginning 12 September, 1927, and it being agreed by the parties that the court should find the facts, after hearing the evidence, the court finds as a fact:

(1) That the parties to the action have agreed as follows: (a) That the town of Kernersville in the year 1925, ordered certain local improvements to be made on several streets in the town, including Railroad Street, the street in controversy in this action. (b) That the said local improvements were made and assessments duly made against the Southern Railway Company as an abutting property owner on the north side of Railroad Street. (c) That Southern Railway Company duly filed an appeal to the Superior Court of Forsyth County from the assessment for pavement on said Railroad Street. (d) That that part of Railroad Street on which the improvement was made is almost wholly within the right of way of the Southern Railway Company, and within forty-five feet of the center of the roadbed, and the improvement which laid on Railroad Street, one-half of the cost of which the town seeks to assess against Southern Railway Company, is entirely within the right of way of the Southern Railway Company.

(2) Upon the evidence introduced the court finds as a fact: (a) That on the .... day of ...., 1868, W. P. Henley and wife, the then owner of the land on which the town of Kernersville is now located, granted to N. W. N. C. R. R. Co. an easement in a strip of land ninety feet in width, which embraces the *locus in quo,* for use as a right of way for the operation of a railroad, and for as long as so used; by successive conveyances said easement is now held by Southern Railway Company. (b) That on 19 February, 1877, the governing authorities of the town of Kernersville, by a resolution spread on their records, the following resolution, viz.: '19 February, 1877. It was passed by the board that a street on each side of the railroad bed 45 feet from centre, be established, beginning at the Danville crossing and running to the Gates crossing. Continuation of the Railroad Street, 54½ feet. Beginning on south side of Main Street at the planking near a chestnut oak tree, running south side of railroad, south 32 deg. east 422 feet to a cedar stake in Cedar Grove; thence south 30 deg. east curving with the railroad to intersect with the Greensboro Street, width of street 54½ feet,' ordered the opening of two streets in the town of Kernersville, one on the north and the other on the south side of the railroad, said street being known as Railroad Street; that the *locus in quo* is one of the streets opened after the adoption of said resolution by the authorities of the town of Kerners-

ville, and since 1877 has been maintained as a public street of the town, and has been worked by the city forces and used by the citizens of the town continuously. (c) That the town of Kernersville ordered the making of local improvements, including the local improvement of Railroad Street, pursuant to petition duly filed by property owners, and that all action taken in connection with the making of said local improvement was regular and in accordance with law. (d) That in apt time Southern Railway Company filed its notice of appeal from the confirmation of the assessment, and filed the statement of facts upon which it based its appeal, alleging in said statement that Railroad Street is not a public street, and that no compensation had been paid Southern Railway Company by the town of Kernersville for the land covered by the street and on which the pavement was laid. (e) That Southern Railway Company had due notice of the intention of the authorities to improve said Railroad Street by making local improvements thereon prior to the commencement of said work, and also had due notice that the authorities of the town considered said street a public street, the Southern Railway Company made no protest and filed no objection to the making of the improvement only until after the work was done and the assessment roll prepared.

Wherefore, the court is of the opinion: (a) That Railroad Street is a public street of the town of Kernersville. (b) That Southern Railway Company, knowing that the town was making costly improvements on said Railroad Street, in the belief that said street was a public street, and would levy assessments against the Southern Railway Company for the cost of said work, offered no objection thereto until after the completion of the work, and is therefore estopped to deny that said street is a public street. (c) That all things had and done by the governing authorities of the town in connection with the ordering and making of the local improvements was done in accordance with statutes governing the making of local improvements. (d) That Southern Railway Company is liable for the assessments levied by the town of Kernersville.

Therefore, it is now ordered, adjudged and decreed that the town of Kernersville have and recover of the Southern Railway Company in the sum of $1,512.78, with interest on said sum from 10 March, 1926, until paid. Southern Railway Company will pay the cost of this action."

J. L. Morehead and W. H. Murdock for town of Kernersville.
Manly, Hendren & Womble for Southern Railway Company.

CLARKSON, J. It will be noted that the parties to this controversy agreed that the court below find the facts. Certain facts were agreed to and the court heard the evidence and found the facts. The finding of facts by the court are as binding on the litigants as the findings by a jury. 38 Cyc., p. 1933 *et seq.*

The court below found the following facts: "That the *locus in quo* is one of the streets opened after the adoption of said resolution by the authorities of the town of Kernersville, and since 1877 has been maintained as a public street of the town, and has been worked by the city forces and used by the citizens of the town continuously."

It is well settled that a municipal corporation cannot exercise the power of eminent domain and acquire land for street purposes unless authorized by its charter or under a provision in the general law. Provision made for condemnation must be bottomed on just compensation. *Lloyd v. Venable,* 168 N. C., p. 531.

It is said in *Raleigh v. Durfey,* 163 N. C., at p. 160: "It is admitted that the plaintiff has been in undisputed actual adverse possession under known and visible lines and boundaries of the entire land and property for sixty years, occupying the same and collecting the rents. Upon these facts it would seem to be plain that plaintiff has acquired an absolute title to the property. One of the methods of acquiring title to land is by adverse possession. *Mobley v. Griffin,* 104 N. C., 115. We know of no reason or authority by which a municipality is excluded from that rule and rendered incompetent to acquire title by that method."

The town of Kernersville has been in the undisputed actual, adverse possession and use of the street under known and visible lines and boundaries for nearly half a century. Ordinarily continuous, adverse use for over twenty years is sufficient to give title. As against an individual there would be no question as to the rights of the town of Kernersville. *S. v. Fisher,* 117 N. C., 733; *Durham v. Wright,* 190 N. C., 568; *Weaver v. Pitts,* 191 N. C., 747; *Grant v. Power Co., ante,* 617.

But C. S., 434, is as follows: "No railroad, plank road, turnpike or canal company may be barred of, or presumed to have conveyed, any real estate, right of way, easement, leasehold, or other interest in the soil which has been condemned, or otherwise obtained for its use, as a right of way, depot, stationhouse or place of landing, by any statute of limitation or by occupation of the same by any person whatever." See *R. R. v. McCaskill,* 94 N. C., 746; *Purifoy v. R. R.,* 108 N. C., 100, 105; *Bass v. Navigation Co.,* 111 N. C., 439; *R. R. v. Olive,* 142 N. C., 257; *Griffith v. R. R.,* 191 N. C., 84; *Wearn v. R. R.,* 191 N. C., 575; *Dowling v. R. R.,* 194 N. C., 488; *Heaton v. Kilpatrick,* 195 N. C., 708.

The railroad contends that under the above statute and the decisions of this Court that in no legal way did the town of Kernersville acquire the street in controversy, and the statute of limitation does not run against the railroad, and also cites *Muse v. R. R.,* 149 N. C., 443. We do not interpret the statute and decisions to that effect. Where the right of eminent domain is given to towns, cities and public agencies for public purposes, if the contention by the railroad is correct, in many instances the result would be to "bottle up" not only the towns and cities of the State, but the highway systems of the counties and State. The right of eminent domain to condemn property for streets and highways, upon the payment of just compensation, is given in numerous town and city charters and the general law. If a railroad refuses to sell its land or right of way, although not needed for railroad purposes, and the public agencies could not condemn, this would tend to destroy progress and public convenience. It is a matter of common knowledge that public streets and highways run over and under railroads and along the side of railroads on and over their rights of way, these streets and highways being often hard-surfaced. Under the right of eminent domain given to towns and cities in their charter and in the general law, and to road-governing bodies, condemnation can be resorted to in reason. Even under certain circumstances a railroad can be compelled to build an underpass for the protection of the public. *Durham v. R. R.,* 185 N. C., 240, 266 U. S., p. 178.

From the record we think there was sufficient evidence for the court below to find that the *locus in quo* was one of the streets opened after the adoption of the resolution of the town of Kernersville in 1877. It was maintained as a public street of the town and worked by the city forces and used by the citizens of the town adversely and continuously for nearly fifty years—the presumption is that it was regularly condemned and just compensation awarded to the railroad. The fact that the resolution of the board was to the effect that the street be 45 feet from the railroad center and the street is almost wholly within the right of way, and the part assessed is entirely within the right of way, is immaterial.

In *Hair v. Downing,* 96 N. C., at p. 176, it is said: "Where the terms of a grant are general or indefinite, so that its construction is uncertain and ambiguous, the acts of the parties contemporaneous with the grant, giving a practical construction to it, shall be deemed to be a just exposition of the intent of the parties. Ang. Water Courses, sec. 363, and cases cited in note 1, and among them *Jonnison v. Walker,* 11 Gray, 426; and *Woodcock v. Estey,* 43 Verm., 522." *Blankenship v. Dowtin,* 191 N. C., at p. 795. To the same effect is *Wearn v. R. R., supra,* and *S. v. Bank,* 193 N. C., 524. The present *locus in quo* has been known as "Railroad Street," and has been worked by the city forces and used by the citizens of the town continuously and recognized by the railroad as a city street, for nearly a half century. The acts of the parties contemporaneous with the taking possession is evidence that it was regularly condemned and located for street purposes. The interpretation the parties put on the transaction will ordinarily be followed.

The street, as we construe the law upon the finding of facts, was properly condemned and abuts on the railroad's property right of way. In Elliott on Railroads, sec. 786, it is said: "There is a conflict in the adjudicated cases as to whether or not the right of way of a railroad company is subject to local assessment. The question has been discussed in a great number of instances and different conclusions reached in apparently similar cases. The latest authorities on the subject, however, recognize what we believe to be the true rule, and that is, that where the right of way receives a benefit from the improvements for which the assessment is levied, and there is no statute exempting the railroad company from local assessments in clear and unequivocal terms it is subject to assessment." *Commissioners v. R. R.,* 133 N. C., at p. 218; *Kinston v. R. R.,* 183 N. C., 14; *Gunter v. Sanford,* 186 N. C., 452; *Town of Mt. Olive v. R. R.,* 188 N. C., 332; *R. R. v. Sanford,* 193 N. C., 340; *Waxhaw v. R. R.,* 195 N. C., 550.

In *R. R. v. Ahoskie,* 192 N. C., p. 258, it is held that under the provisions of the statute, it is necessary that there be an existing street in order for a valid assessment for improvements to be laid on the property of abutting owner. In the present case, "Railroad Street" is an existing street for the reasons stated.

It is found as a fact: "That Southern Railway Company had due notice of the intention of the authorities to improve said Railroad Street by making local improvements thereon, prior to the commencement of said work, and also had due notice that the authorities of the town considered said street a public street, and Southern Railway Company made no protest and filed no objection to the making of the improvement only until after the work was done and the assessment roll prepared."

This finding is fully sustained by the evidence. The following letter appears in the record: "Southern Railway System, Operating Department, Winston-Salem, N. C., 18 April, 1925. Mr. S. F. Vance, Mayor, Town of Kernersville, Kernersville, N. C. Dear Sir: I understand the town of Kernersville proposes to have (pave) Railroad Street from Main Street to Cherry Street, a distance of 350 feet, and 20 feet wide. Won't you kindly advise how long this street has been open, and for what distance? Please furnish me the three certified copies of ordinance passed by the town council authorizing the city to do this work. Also advise for what portion of this expense we will be assessed, whether the assessment can be paid in installments, the amount of each installment and date due, and if the ordinance imposes a penalty, and effective date of such penalty. Kindly let me have above information at once, *and as soon as paving is* *completed, furnish me bills in triplicate to cover.* Your early attention to this will be appreciated. Yours respectfully, J. S. Bergman, Supt."

It would be a peculiar anomaly for the railroad company, knowing that the improvements were being made, its superintendent with full knowledge recognizing "Railroad Street" and writes "as soon as paving is completed, furnish me bill in triplicate to cover," now to claim that they are the owners of the street paved at the expense of the town.

Even against a trespasser, it is said in *R. R. v. McCaskill,* 94 N. C., at p. 754: "Mere silence while a trespasser is improving real estate as if it were his own, while it may sustain a claim for the value of such improvements made in good faith, cannot be allowed to transfer the property itself to the usurping occupant."

In *Sugg v. Credit Corporation, ante,* at p. 99, speaking to the subject, it is stated: "The doctrine of equitable estoppel is based on an application of the golden rule to the everyday affairs of men. It requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed. *Boddie v. Bond,* 154 N. C., 359, 70 S. E., 824; 10 R. C. L., 688, *et seq.* Its compulsion is one of fair play." *Charlotte v. Alexander,* 173 N. C., at p. 519-20.

Charlotte v. Brown, 165 N. C., 435, is not in conflict with the position here taken. In that case, at p. 437-8, it is said: "The excess of 20 per cent of the assessment *being void* (italics ours), under the charter of the plaintiff, the defendant may enjoin the collection of the excess." *Flowers v. Charlotte,* 195 N. C., 599. Nor is *The Delaware, Lackawanna, etc., R. R. v. Town of Morristown,* 276 U. S., 182, 72 Law Ed., 523. For the reasons given, the judgment below is

Affirmed.

W. D. HAM, O. SHIRLEY, G. T. THOMAS, MARIA HAM, J. E. HAM AND BEN CARRAWAY, ON BEHALF OF THEMSELVES AND OTHER DEPOSITOR-CREDITORS OF THE SNOW HILL BANKING AND TRUST COMPANY, v. G. A. NORWOOD, J. H. HARPER, B. W. EDWARDS, A. H. JOYNER, D. S. HARPER, S. H. HICKS AND J. E. ALBRITTON, OFFICERS AND DIRECTORS OF THE SNOW HILL BANKING AND TRUST COMPANY AND AS INDIVIDUALS, AND THE NATIONAL BANK OF SNOW HILL, RECEIVER OF THE SNOW HILL BANKING AND TRUST COMPANY.

(Filed 20 March, 1929.)

1. **Banks and Banking—Depositors and Creditors—Right to Bring Action Against Officers for Wrongful Depletion of Assets—Demurrer.**

The depositors and creditors of a bank in a receiver's hands may maintain an action against the officers of the bank to recover in behalf of the bank damages alleged as resulting from their unlawful, wrongful and negligent conduct, and a demurrer to a complaint alleging this cause of action and not claiming damages resulting thereby to the individual plaintiffs, with further allegations that the receiver had refused to bring the action, is bad and properly overruled.

2. **Same—Receivers—Parties.**

The right of action against the officers of an insolvent bank for their negligence or wilful misconduct as such officers vests in the receiver of the bank duly appointed by the court, and after his refusal of the demand of the depositors and creditors of the bank to bring the action, and it is brought by them for and in behalf of the bank, the receiver is a proper party defendant to administer the recovery, if any, in its proper distribution among the creditors and stockholders according to priority.

3. **Same—Demurrer—Misjoinder of Parties and Causes of Action.**

The depositors and creditors of a defunct bank in a receiver's hands may bring an action in behalf of the bank against its officers for their unlawful, negligent, or wilful acts, causing its insolvency when the receiver has refused to bring the action, and a demurrer by a defendant to their complaint for misjoinder of parties and causes of action is bad.

4. **Same—Order of Court.**

The court in the exercise of its sound discretion may pass upon the question of ordering the receiver of a defunct bank to bring an action against its officers for the wrongful depletion of assets upon the demand of the depositors and creditors, and in the absence of such order, the complaining depositors and creditors may maintain the action in behalf of the defunct bank, making the receiver a party defendant, at their own risk as to the cost of the action.

5. **Same—Pleadings—Issues—Jurisdictional Questions.**

Where the depositors and creditors of a defunct bank in a receiver's hands bring action for the benefit of the bank and against its officers for their negligent, unlawful, or wilful acts causing its insolvency, and the allegation in the complaint that they had made demand upon the receiver to bring the action and that he had refused, is denied, a jurisdictional issue is raised for the finding of the jury as to the controverted fact.

6. **Same—Liability of Officers—Demurrer.**

Where the complaint in an action brought against the officers of a defunct bank alleges that the damages for their negligence occurred while they were such officers: *Held*, sufficient, and distinguishable from *Trust Co. v. Pierce*, 195 N. C., 717.

STACY, C. J., dissenting; BROGDEN, J., concurring in dissent.

APPEAL by defendant, G. A. Norwood, from judgment of Superior Court of GREENE, at Chambers, 31 December, 1928. *Nunn, J.* Affirmed.

Action by certain depositors and creditors of an insolvent bank, in behalf of themselves and all other depositors and creditors, to recover damages sustained by said bank, resulting in its insolvency, and caused by the wrongful acts of defendants, as its officers and directors.

The receiver of said bank is a party defendant. It is alleged in the complaint that said receiver, upon demand duly and regularly made upon him, prior to the commencement of this action, refused to bring suit to recover said damages. It is further alleged therein that "by reason of the unlawful, wrongful and negligent conduct on the part of said defendants as hereinbefore alleged, these plaintiffs have been damaged in the sum of $177,117.59, less such amounts as the receiver has been able to realize from such assets as were left intact at the time of the closing of the doors of the said Snow Hill Banking and Trust Company, which said amount is not exactly known to these plaintiffs, but upon information and belief, they allege said amount to be about $55,000, and these plaintiffs here demand that the defendant, the National Bank of Snow Hill, receiver of the Snow Hill Banking and Trust Company, file in this cause a true and complete statement of the net receipts from the said Snow Hill Banking and Trust Company's assets which were turned over to such receiver."

From judgment overruling his demurrers to the complaint, both written and *ore tenus,* defendant, G. A. Norwood, appealed to the Supreme Court.

J. Faison Thomson, Rivers D. Johnson and Shaw & Jones for plaintiffs.

Teague & Dees and Kenneth C. Royall for defendants.

Connor, J. The demurrer, in writing, of the defendant, G. A. Norwood, for that it appears upon the face of the complaint (1) that there is a defect of parties defendant; (2) that there is a defect of parties plaintiff, and (3) that several causes of action have been improperly united therein, was properly overruled. The said demurrer cannot be sustained.

The cause of action set out in the complaint, as will appear by reference to the allegations contained therein, is not for the recovery of damages which the several plaintiffs have sustained as individual depositors and creditors of the Snow Hill Banking and Trust Company, by reason of its insolvency; it is not alleged that each of the plaintiffs has sustained damages peculiar to himself, which he alone would be entitled to recover of defendants, under the authority of *Bane v. Powell,* 192 N. C., 387, 135 S. E., 118, cited and approved in *Wall v. Howard,* 194 N. C., 310, 139 S. E., 449. The cause of action is for the recovery of damages sustained, primarily, by the Snow Hill Banking and Trust Company, resulting in its insolvency, and caused, as alleged in the complaint, by the wrongful acts of defendants, acting not as individuals, but as its officers and directors, charged with certain specific duties to said Banking and Trust Company, which it is alleged they have wilfully, wrongfully and unlawfully failed to perform. The allegations of the complaint are sufficient to constitute a cause of action in favor of the Snow Hill Banking and Trust Company, under the authority of *Douglass v. Dawson,* 190 N. C., 458, 130 S. E., 195, also cited and approved in *Wall v. Howard, supra.* In *Corporation Commission v. Bank,* 193 N. C., 113, 136 S. E., 362, it is said, in the opinion written by *Stacy, C. J.:*

"That the right of action against the officers and directors of a banking corporation, for loss or depletion of the company's assets, due to their wilful or negligent failure to perform their official duties, is a right accruing to the bank, enforceable by the bank itself, prior to insolvency, and hence enforceable by the receiver for the benefit of the bank, as well as for the benefit of its creditors, is the holding or rationale of all the decisions on the subject." *Douglass v. Dawson,* 190 N. C., 458, 130 S. E., 195; *Besseliew v. Brown,* 177 N. C., 65, 97 S. E., 743; *Bane v. Powell,* 192 N. C., 387, 135 S. E., 118; *Wall v. Howard,* 194 N. C., 310, 139 S. E., 449.

Upon the appointment of its receiver, after the adjudication that it was insolvent, the cause of action against the defendants herein, which upon the allegations of the complaint had accrued to the Snow Hill Banking and Trust Company, passed to and vested in said receiver, as an asset of said Banking and Trust Company, to be administered by said receiver for the benefit of creditors, depositors and stockholders of said Banking and Trust Company. It is well settled that it is the right of said receiver, and ordinarily his duty, to realize, if possible, by suit or otherwise, upon said asset, by reducing same to money. Money realized from such asset, by suit or otherwise, must be distributed ratably and equally, first, until they are paid in full, among the creditors and depositors, having regard, of course, for priorities, where they exist, and then among the stockholders of said insolvent company. *Corp. Com. v. Bank, supra;* Zane on Banks and Banking, sec. 86. It was held by this Court in *Wall v. Howard, supra,* that the receiver of an insolvent bank, alone, *nothing else appearing,* can maintain an action to recover of officers and directors of such bank, damages for a wrong done by them to the bank. In *Douglass v. Dawson, supra,* it is said:

"Actions to recover such assets must be brought and prosecuted by the receiver, in his name, as representing all the creditors as well as the corporation in process of liquidation, or if such actions are brought by creditors or stockholders, it must be alleged in the complaint that demand was made upon the receiver to institute the action, and that he has refused to comply with said demand. In an action brought by creditors, depositors or stockholders to recover assets belonging to the corporation, the title to which has vested in the receiver, upon his refusal to bring the action, the receiver may properly be made a defendant, to the end that the recovery may be subject to orders and decrees of the court, in the judgment, as to its application to the claims of creditors and depositors, or to its distribution among stockholders."

The procedure suggested in the opinion in *Douglass v. Dawson, supra,* and approved by this Court, is in accord with the principle, upon which *Moore v. Mining Company,* 104 N. C., 534, 10 S. E., 679, and *Merrimon v. Paving Co.,* 142 N. C., 539, 55 S. E., 366, were decided. In the opinions in both these cases, *Hawes v. Oakland,* 104 U. S., 450, 26 L. Ed., 827, is cited and followed. In that case it was held that to entitle a stockholder in a corporation to maintain an action in his own name, for a wrong done to the corporation, he must allege that he has, before instituting the action, exhausted all the means in his power to obtain redress of his grievances, within the corporation. When the corporation, acting through its officers and directors, or through a majority of its stockholders, upon the demand of minority stockholders, has refused to seek redress of such grievances by an action against those who are liable to the corporation, the minority stockholders, in their own name, as plaintiffs, may bring and prosecute an action for such redress. Recovery in such action will ordinarily enure to the benefit of all the stockholders.

Where the corporation has become insolvent, by reason of a wrong done it, and a receiver has been appointed, in whom the cause of action for recovery for such wrong has vested, the creditors of the corporation as well as its stockholders, who have suffered from such wrong, upon the refusal of the receiver to bring an action to recover for such wrong, in compliance with their demand, are not and ought not to be without a remedy.

Ordinarily, when it is made to appear to the court which has appointed the receiver of an insolvent corporation, that a cause of action exists in favor of such corporation, which is an asset available for the benefit of its creditors and stockholders, and that the receiver has refused to enforce the same by action against parties who are liable thereon, upon demand of creditors and stockholders, the court will order the receiver to bring an action, for the purpose of recovery on said cause of action. It may be, however, that although the court finds that a cause of action exists as alleged by creditors and stockholders, it may further find that by reason of the insolvency of the parties liable thereon, or for other causes, the prosecution of the cause of action is not advisable for the reason that a substantial recovery thereon is not probable. In such case the court, in the exercise of its discretion, may well refuse to order the receiver to bring the action, and to prosecute the same at the expense of the assets in his hands; or if the court shall find that the receiver, in refusing to bring the action, upon the demand of creditors or stockholders, acted in good faith, and in the exercise of a sound judgment, it may decline to make the order, or to remove the receiver, and appoint another as receiver.

Creditors or stockholders, whose demand upon the receiver of an insolvent corporation, that he bring an action to enforce a cause of action in favor of the corporation, existing at the date of his appointment, has been refused, are not required to petition the court for an order that the receiver bring the action. They may, after such demand and refusal, bring the action and prosecute the same at their expense. In the event that they fail to recover, or if they recover a judgment which does not increase the substantial assets of the insolvent corporation, because of the insolvency of the judgment debtors, all costs and expenses of the action must be borne by the plaintiffs; they will not ordinarily be a charge upon the assets of the insolvent corporation in the hands of the receiver. A recovery in such action, resulting in an increase of the assets in the hands of the receiver, will inure to the benefit of all the creditors and upon the satisfaction in full of their claims, to the benefit of all the stockholders of the insolvent corporation. The receiver may properly be made a party defendant in order that the recovery, if any, may be distributed by him in accordance with the orders and decrees of the court, just as other assets in his hands are distributed.

In the instant case, we find no error in the judgment overruling the demurrer, *ore tenus,* of the appealing defendant. The facts alleged in the complaint constitute a cause of action. The allegation that demand was made on the receiver to bring an action against the defendants upon the facts alleged, and that such demand was refused, if denied in the answer, will raise an issue which is jurisdictional in its nature. If a contention is made by defendants that the allegations of the complaint are not sufficiently definite and specific, relief may be afforded by an order that plaintiffs file a bill of particulars; if such bill is filed, plaintiffs will be restricted on the trial to proof of the matters particularly specified therein. *Gore v. Wilmington,* 194 N. C., 450, 140 S. E., 71; *S. v. Wadford,* 194 N. C., 336, 139 S. E., 608.

Upon the allegations of the complaint this action is easily distinguishable from *Trust Co. v. Pierce,* 195 N. C., 717, 143 S. E., 524. It does not appear upon the face of the complaint in this action, that defendants were officers and directors of the Snow Hill Banking and Trust Company for different or successive terms. It is alleged that they were all officers and directors during the time the wrongs were committed by them acting as such, which wrongs resulted in the insolvency of the said Banking and Trust Company, and for which damages are sought to be recovered in this action.

It seems proper to observe that on this appeal we are not dealing with the merits of this action, but solely with the sufficiency of the allegations of the complaint. *Furniture Co. v. R. R.,* 195 N. C., 636, 143 S. E., 242. We decide only that the allegations are sufficient, and that there was no error in overruling defendant's demurrers, both written and *ore tenus,* to the complaint. These demurrers present for decision issues of law only. If the material allegations of the complaint are denied in the answer, which defendant has leave to file, issues of fact will be raised, which will be tried according to law, in order that the truth may be established and judgment be rendered according to law. The judgment is

Affirmed.

STACY, C. J., dissenting: In my opinion, the plaintiffs are not in position to make the tort liability of the defendants to the bank and its receiver the basis of a creditors' bill. Where a number of persons are injured by the tort of another or others, each may sue for his own damage, but I had not thought it permissible, in the absence of statutory authority, unless by consent, for all to join in one suit and prosecute their claims in a single action.

I am authorized to say that *Mr. Justice Brogden* entertains views similar to those here expressed.

MARY D. REDMOND, ADMINISTRATRIX OF MARCELLUS REDMOND, v. THE NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 20 March, 1929.)

Railroads—Operation—Injuries to Person On or Near Track—Contributory Negligence—Last Clear Chance.

Evidence tending only to show that the plaintiff's intestate left the defendant's track at the approach of its train and returned to rescue his hog on the track when the running train was in about five feet of the place is insufficient to take the case to the jury upon the issue of negligence or apply the doctrine requiring a signal or warning to be given by the defendant's engineer, or that of last clear chance.

APPEAL by plaintiff from *Grady, J.,* at January Special Term, 1929, of WAKE. Affirmed.

Action to recover for the wrongful death of plaintiff's intestate. From judgment of nonsuit, at the close of plaintiff's evidence, plaintiff appealed to the Supreme Court.

Chas. U. Harris and Gatling, Morris & Parker for plaintiff.
Robert N. Simms for defendant.

PER CURIAM. The evidence of the plaintiff tended to show that the death of her intestate was caused by his own negligence, in going upon defendant's track, for the purpose of rescuing his hog from danger, when defendant's train was within about five feet of the hog. There was no evidence from which the jury could have found that defendant's negligence, in failing to blow the whistle or ring the bell, or in failing to keep a proper lookout, was the proximate cause of the injuries which resulted in the death of plaintiff's intestate.

This case is easily distinguishable from *Jenkins v. R. R., ante,* 466, 146 S. E., 83, and *Hart v. R. R.,* 193 N. C., 317, 136 S. E., 874. Plaintiff's intestate was not on or near defendant's track in an apparently helpless condition, at a distance from the train, within which the train could have been stopped by the exercise of reasonable care, before it struck and injured him.

There was no evidence from which the jury could have found facts to which the doctrine of the "last clear chance" is applicable. This doctrine and the principles upon which it is founded are fully discussed by *Brogden, J.,* in his opinion in *Redmond v. R. R.,* 195 N. C., 764, 143 S. E., 829. He says: "The doctrine does not apply to trespassers and licensees upon the tracks of a railroad who, at the time, are in apparent possession of their strength and faculties, the engineer of the train, producing the injury, having no information to the contrary. Under such circumstances the engineer is not required to stop his train or even slacken his speed, for the reason that he may assume until the very moment of impact that the pedestrian will use his faculties for his own protection and leave the track in time to avoid the injury."

In the instant case, plaintiff's intestate left the track, because he was aware of the approaching train. When he went back upon the track, in his effort to save his hog, the train was within five feet of the hog. The train could not have been stopped within this distance. Plaintiff cannot recover in this action, because the death of her intestate was not caused by the negligence of defendant, but by his own negligence. Upon the evidence, defendant does not rely upon contributory negligence as a defense. Plaintiff, therefore, cannot invoke the doctrine of the "last clear chance" to support her right to recover of defendant. This doctrine, although well established in this jurisdiction, has no application to the instant case. The judgment dismissing the action is

Affirmed.

T. W. GRAY AND DORA GRAY, HIS WIFE, v. T. W. MEWBORN ET AL.

(Filed 20 March, 1929.)

Reformation of Instruments — Grounds Therefor — Mutual Mistakes — Mortgages.

In a suit to reform mortgage on lands upon the mutual mistake that a properly indexed junior mortgage should be subject to a prior insufficiently registered one under agreement between respective parties: *Held*, reformation of the instrument upon the verdict of the jury is not error.

APPEAL by defendant, Mewborn, from *Grady, J.*, at November Term, 1928, of LENOIR. No error.

F. E. Wallace, C. W. Pridgen, Jr., and McLean & Stacy for plaintiffs.
Rouse & Rouse for defendant.

PER CURIAM. On 10 February, 1916, the plaintiffs executed a mortgage to J. H. Parham and others to secure the sum of $204. The mortgage was registered on 12 February, 1916, and afterwards transferred to the defendant, R. H. Gray. On 25 February, 1919, the plaintiffs to secure the payment of $1,000 executed to Parham and others a mortgage which was registered 6 March, 1919. On 21 December, 1920, they executed to R. H. Gray a mortgage for $2,130, which was registered immediately, but was not cross-indexed until February, 1923. On 21 December, 1920, they gave a mortgage to the defendant, Mewborn, for $2,800, which was registered and cross-indexed on 6 February, 1921. The following is the warranty clause of the mortgage to Mewborn: "That the same are free from all encumbrances whatsoever except $2,130 to Hadley Gray; $204 to H. C. Wooten; $1,000 to Parham, Suggs and Herring, on tract No. 1; and $1,800 to George W. Garris on tracts No. 2 and No. 3."

On 1 March, 1922, the plaintiffs executed a deed of trust to R. E. Mewborn, trustee for T. W. Mewborn, to secure the debt for which the mortgage of 21 December, 1920, was executed. On 12 January, 1924, J. H. Parham and others brought suit against T. W. Gray to foreclose the mortgage for $204, to which judgment creditors and all the other mortgagees became parties. The land was sold by a commissioner, and in the application of the proceeds other claims were given priority over the Gray mortgage for the reason that this mortgage had not been properly indexed prior to the registration of the Mewborn mortgage. This action was instituted to reform the Mewborn mortgage and the deed of trust. A demurrer was filed and overruled. *Gray v. Mewborn*, 194 N. C., 348. Thereafter a trial was had and this verdict was returned:

1. Was it understood and agreed between T. W. Gray and T. W. Mewborn that the mortgage deed from Gray and wife to Mewborn, dated 21 December, 1920, should contain a clause or proviso that it should be junior in effect to the mortgage deed made by T. W. Gray and wife to R. H. Gray, dated 21 December, 1920, as alleged in the complaint? Answer: Yes.

2. If so, was such clause or proviso left out of said mortgage deed through the mutual mistake of the parties, as alleged in the complaint? Answer: Yes.

From a judgment for the plaintiffs the defendant, Mewborn, appealed.

There are four assignments of error. The first rests on an exception to the admission of negative testimony; the second and third on exceptions to the refusal to dismiss the action as in case of nonsuit; and the fourth on an exception to the judgment. None of these exceptions presents sufficient cause for granting a new trial.

No error.

STATE v. ALBERT ANDERSON.

(Filed 27 March, 1929.)

Asylums—Manager and Officers—Malfeasance, Nonfeasance, and Removal from Office—Arrest of Judgment.

While corrupt intent is not necessary to sustain a conviction under the provisions of C. S., 4384, making it a misdemeanor for a public officer to wilfully or negligently omit, etc., to discharge any of the duties of his office, it is required that the indictment sufficiently charge the offense of which such officer is accused; and where the action is against the superintendent of a State hospital for the insane, and the indictment charges that he removed or caused to be removed patients to his private farm and caused them to be worked thereon, without allegation of injury to the public or to the patients, or of personal gain to the defendant, the indictment fails to charge facts sufficient to constitute an offense under the statute, and defendant's motion in arrest of judgment should be allowed.

CRIMINAL ACTION, before *Devin, J.,* at November Term, 1928, of WAKE.

The bill of indictment contains fifteen counts, alleging certain acts of misfeasance and nonfeasance against the defendant, who is superintendent of State Hospital. At the conclusion of the evidence the trial judge excluded from the consideration of the jury all counts in said bill except the first, second, seventh, eighth, eleventh, twelfth and fifteenth. The jury rendered a verdict of guilty upon the seventh and eighth counts only, and it was adjudged "that the defendant was not guilty as to each and every count in the bill of indictment except the seventh and eighth." The bill is drawn under C. S., 4384. The seventh and eighth counts are as follows: (7th) "That on or about 30 December, 1927, and at various other times, the said Albert Anderson, superintendent of State Hospital at Raleigh, N. C., removed or caused to be removed patients, whose names are unknown to the jurors at this time, to his private property in Anderson Heights, and then and there caused said patients to work on his, the said Anderson's private property, clearing out underbrush, cutting roads, etc." (8th) "That on or about 30 June, 1928, and at various other times, the said Anderson, superintendent of said State Hospital, as aforesaid, removed or caused to be removed from said hospital patients of said hospital to his private farm and there required said patients to work harvesting hay."

The defendant in apt time lodged a motion in arrest of judgment and for a directed verdict of not guilty upon each count in the bill.

The defendant admitted that at times he took patients in his own car to his farm, and that he himself put on overalls and they worked together from thirty minutes to two hours doing such petty work as piling brush or cutting down bushes or raking hay; that in going to and from his farm he frequently took these patients for a ride through Raleigh and near-by towns in order to provide mental diversion. The defendant insisted that such petty work as was done on his farm was a method of treatment in that patients were removed from the environment of the institution and turned out into the open where they could think and act for themselves. This method of dealing with those suffering with mental diseases is known as occupational therapy. This method of treatment was approved by many of the leading experts in the country, who testified at the trial.

Dr. Davison, Dean of the Medical School at Duke University, testified: "There is a department of occupational therapy in every insane hospital as well as general hospitals in order to fit the patients to go back to normal life as soon as possible, and such work is very beneficial. It is better to take patients away from the hospital in company with the superintendent, and give them such employment as stacking hay or work of that kind on premises away from the hospital. It increases the patient's self-confidence by allowing him to get away from the hospital grounds. I have had an opportunity to observe the general method of hygiene and sanitation in the State Hospital in Raleigh, and it is the very best run institution that I have ever seen. . . . I think it is the taking of a patient away from the hospital grounds that is of special advantage. Those in Baltimore would ask me to take them on my place, and it would increase confidence in themselves. I think that there is an advantage in working with the superintendent because they feel that they are in contact with the person in charge of the institution."

Other eminent experts expressed the same view, including Dr. Linville, superintendent State Hospital at Goldsboro; Dr. William McDougald, of Duke University; Dr. Thurman Kitchin, Dean of Medical School at Wake Forest; Dr. J. K. Hall, of Richmond; Dr. Laughinghouse, Secretary State Board of Health, and Dr. Rankin, of Duke University.

The court adjudged that the defendant should pay a fine of $500 and costs, from which judgment the defendant appealed.

Walter D. Siler, Assistant Attorney-General, for the State.

Biggs & Broughton, R. N. Simms, Bunn & Arendell and R. L. McMillan for defendant.

BROGDEN, J. C. S., 4384, under which the indictment was drawn, specifies two offenses:

1. That if any official named therein "shall wilfully omit, neglect or refuse to discharge any of the duties of his office . . . he shall be guilty of a misdemeanor."

2. If it shall be proved that such officer "wilfully and corruptly omitted, neglected or refused to discharge any of the duties of his office, etc., . . . such officer shall be guilty of misbehavior in office, and shall be punished by removal therefrom, etc."

The statute has been construed by this Court in several decisions. In indictments for neglect of duty corrupt intent need not be shown. *S. v. Leeper,* 146 N. C., 655, 61 S. E., 585; *Battle v. Rocky Mount,* 156 N. C., 329, 72 S. E., 354; *S. v. Berry,* 169 N. C., 371, 85 S. E., 387. The foundation of liability to indictment of such officers under the statute is thus expressed in *S. v. Hatch,* 116 N. C., 1003, 21 S. E., 430: "However honest the defendants may be (and their honesty is not called in question) the public have a right to be protected against the wrongful conduct of their servants, if there is carelessness amounting to a wilful want of care in the discharge of their official duties, which injures the public."

It is to be observed that the essentials of the crime as prescribed are: first, a wilful neglect in the discharge of official duty; and second, injury to the public.

Applying the rules of law to the seventh and eighth counts in the bill of indictment, it would appear that no crime contemplated by the statute is charged in said counts. There is no allegation of injury to the public or that the defendant derived a profit from the petty labor of the patients; neither is there allegation as to the violation of any specific duty imposed by any statute of the State or by any rule or regulation duly prescribed by the directors of the institution. Moreover, there is no allegation that any patient was injured or harmed in any manner.

These defects appear upon the face of the bill, and the motion in arrest of judgment should have been allowed. *S. v. Brady,* 177 N. C., 587, 99 S. E., 7; *S. v. McKnight, ante,* 259.

Error.

ARTHUR VIVIAN v. SEASHORE TRANSPORTATION COMPANY AND DOVER-SOUTHBOUND RAILROAD COMPANY.

(Filed 27 March, 1929.)

1. **Parties Defendant—Joinder—Joint Tort-Feasors—Automobiles—Railroads—Demurrer—Negligence.**

Where a passenger of an autobus transportation company sues the bus company and a railroad company for injuries alleged to have been caused by a collision between the bus of one defendant and the train of the other, with allegations of negligence as to each, he may recover against either or both defendants upon their joint or combined negligence, and a demurrer to the complaint is bad.

2. **Same.**

Where two defendants are sued for a joint tort, and one has filed an answer alleging the negligence of the other as the sole proximate cause of the injury in suit, but asks no relief against its codefendant, the demurrer of the latter to the answer of the former should be disregarded.

CIVIL ACTION, before *Grady, J.,* at November Term, 1928, of LENOIR.

The plaintiff alleged that on or about 20 July, 1927, he was a passenger on a bus owned and operated by the defendant, Seashore Transportion Company, and traveling from New Bern to Kinston; that said bus was equipped with faulty and defective brakes and operated in a careless, negligent and reckless manner, and at an unlawful rate of speed; that when said bus approached Phillips crossing it failed to stop as required by law, but was carelessly and negligently driven into a train owned and operated by the defendant, Dover-Southbound Railroad Company, and that as a result of said collision plaintiff sustained serious and permanent injuries. The defendant, Transportation Company, made a motion in the cause asking that the Railroad Company be made a party to the suit. The trial judge entered an order making the Railroad Company a party defendant, and summons was duly issued and served upon said defendant. The answer of the Transportation Company denied that it was guilty of any negligence, and as a further defense alleged that the collision between the bus and the train, resulting in injury to the plaintiff, was caused by the negligence of the Railroad Company, for that said company permitted obstructions, bushes and weeds to grow upon its right of way near said crossing so as to obscure the view of those approaching its track, and furthermore, that at the time of the collision the said defendant failed to keep a proper lookout or give any signal as the train approached said crossing, and that "any injury to the plaintiff . . . is due directly and proximately to the carelessness of the defendant, Dover-Southbound Railroad Company."

Thereupon the plaintiff filed an amended complaint adopting all the allegations in the original complaint against the Transportation Company, and further alleging that the said collision was due to the wilful, wanton, careless, negligent and unlawful manner in which the defendant, Transportation Company, was operating the bus in which the plaintiff was riding at the time as passenger, and the wilful, wanton, careless, negligent and unlawful manner in which the defendant, Railroad Company, was operating its train at said crossing, . . . in that it failed to give any warning or signal of its approach and failed to keep proper lookout as its train entered the crossing.

The defendant, Dover-Southbound Railroad Company, demurred to the complaint and the amended complaint upon the ground that no cause of action was alleged therein, and upon the further ground that there was a misjoinder of causes and of parties. And said defendant further demurred to the answer of the Transportation Company upon the same ground.

The trial judge overruled the demurrers of the defendant, Railroad Company, and it appealed.

Cowper, Whitaker & Allen for plaintiff.

Dawson & Jones for defendant, Transportation Company.

Warren & Warren for defendant, Dover-Southbound Railroad Company.

BROGDEN, J. The principle of law applicable to the controversy in its present stage is stated in *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761, as follows: "That one who is riding in an automobile, the driver of which is not his agent or servant, nor under his control, and who is injured by the joint or combined negligence of a third person and the driver, may recover of either or both, upon proper allegations, for the injuries thus inflicted through such concurring negligence, is fully established by our own decisions and the great weight of authority elsewhere."

The complaint and the amended complaint allege a cause of action against both defendants, and therefore the demurrer to the pleadings filed by the plaintiff was properly overruled. The answer of the Transportation Company alleges negligence on the part of the railroad as the sole and proximate cause of plaintiff's injury, but the Transportation Company asks for no relief against the Railroad Company. Hence the demurrer of the Railroad Company to the answer of the Transportation Company should be disregarded. *Bargeon v. Transportation Co., post,* 776; *Ballinger v. Thomas,* 195 N. C., 517.

Affirmed.

H. A. BARGEON v. SEASHORE TRANSPORTATION COMPANY, INC., AND DOVER-SOUTHBOUND RAILROAD COMPANY.

(Filed 27 March, 1929.)

Parties Defendant—Joinder—Joint Tort-Feasors—Demurrer—Cause of Action.

Where a defendant has another party joined as a codefendant, and files an answer denying the allegations of negligence on his part and alleging that the negligence of such codefendant was the sole proximate cause of the injury in suit, but does not demand relief against such codefendant, and the complaint states no cause of action against him, the demurrer of the codefendant to the answer is good, and the action as to him will be dismissed. In this case the statute in regard to contribution between joint *tort-feasors* does not apply, the cause of action arising before its passage and operation.

CIVIL ACTION, before *Grady, J.*, at November Term, 1928, of LENOIR.

The plaintiff in this action was a passenger in the same bus referred to in the companion case of *Vivian v. Transportation Co., ante,* 774, where the facts are stated in detail.

The Transportation Company, upon motion, procured an order, making the Railroad Company a party, and summons was duly issued and served. Thereupon the Transportation Company filed an answer, denying negligence and alleging that any injury sustained by the plaintiff was proximately caused by the negligence and carelessness of the Railroad Company as specifically set out in the answer. No relief, however, against the Railroad Company was asked by the Transportation Company.

The Railroad Company demurred to the complaint and to the answer of the Transportation Company upon the ground that no cause of action was stated in either pleading. The plaintiff filed no amended complaint, and, at the November Term, 1928, the presiding judge sustained the demurrer and dismissed the action as against the Railroad Company, from which judgment the Transportation Company appealed.

Dawson & Jones for Transportation Company.
Warren & Warren for Dover-Southbound Railroad Company.

BROGDEN, J. Can one defendant, sued alone for personal injury, file an answer denying negligence and liability, and then proceed to allege that the injury was due to the specific acts of negligence of a third party, and thereupon, without asking relief against such third party, have such party brought into the suit?

It is well settled under our system of procedure that in order to hold a party in court a cause of action must be alleged against him. If a defendant against whom a cause of action exists alleges a cause of action against a codefendant, growing out of the same matter, then all the parties are in court and the causes must be tried upon their merits. *Bowman v. Greensboro,* 190 N. C., 611, 130 S. E., 502; *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761.

The *Ballinger case* established two propositions of law:

First, that the plaintiff had alleged no cause of action against the appealing defendant.

Second, that the codefendant, Thomas, had not sufficiently alleged a cause of action against the appealing defendant.

In other words, in that case, the plaintiff alleged too much, and the defendant, Thomas, too little. The demurrer to the complaint was sustained by this Court, and the demurrer to the answer of Thomas was dismissed because the defendant, Thomas, in his answer denied negligence and set up the defense that a third party, to wit, the Railroad Company, was solely responsible for the plaintiff's injury. A mere defense made by one codefendant is not subject to demurrer by the other defendant brought into the case. The result was that the Southern Railway Company went out of the case because under the pleadings it could not be held either by the plaintiff or the defendant, Thomas.

Applying the principle announced in the *Ballinger case* to the pleadings in the case at bar, it is clear that the defendant, Dover-Southbound Railroad Company, cannot be held upon the present record, and the ruling of the court is affirmed.

The amendment of C. S., 618, enacted 27 February, 1929, permitting contribution between joint *tort-feasors,* does not of course apply to the case at bar, for the reason that the amendment creating such a cause of action was passed after this suit was commenced.

Affirmed.

ROBERT CUNNINGHAM ET AL. v. LAURA L. WORTHINGTON.

(Filed 27 March, 1929.)

Deeds and Conveyances—Construction and Operation—Estates and Interests Created.

Under a deed of lands to a mother and children, after the reservation of a life estate in the grantor, the grantees take as tenants in common in remainder as of the time of the execution of the deed, and the children born of the mother during the continuance of the life estate or thereafter are excluded. In this case there was no child *in ventre sa mere* at the date of the deed.

CIVIL ACTION, before *Daniels, J.*, at January Term, 1929, of PITT.

This cause was submitted upon agreed facts. On 5 June, 1919, Marcellus Sutton and wife, Laura Sutton, executed and delivered a deed conveying to Olivia Cunningham and her children and their heirs and assigns a certain tract or parcel of land, etc. The grantors reserved a life estate in said Marcellus Sutton. Marcellus Sutton, one of the grantors, is dead, but Laura Sutton, the other grantor, and wife of said Marcellus Sutton, is now living and joins in this proceeding. At the time of the execution and delivery of the deed from Marcellus Sutton and Laura Sutton, his wife, to Olivia Cunningham and her children, the said Olivia Cunningham had only two children, to wit, Robert Cunningham and Ray Cunningham. Since the execution of the deed Olivia Cunningham has had four children. All of said children are minors, and this action has been duly instituted by their guardian. A special proceeding was instituted to sell said land for reinvestment. The defendant, Laura L. Worthington, agreed to purchase said land for the sum of $6,800, which was found to be a fair price for said property. The defendant, however, refused to accept the deed tendered by the commissioner appointed in the cause upon the ground that said deed did not convey an indefeasible title to said land.

The pertinent part of the judgment is as follows: "And it further appearing to the court that at the time of the execution and delivery of said deed, said Olivia Cunningham had only two children then living, namely, Robert Cunningham and Ray Cunningham, and that since that time four other children have been born to the said Olivia Cunningham. . . . And the court being of the opinion that the said Olivia Cunningham and her two children, to wit, Robert Cunningham and Ray Cunningham, in existence at the time of the execution and delivery of said deed, took a fee-simple title in said lands as tenants in common, subject to the life estate of the grantors, and that after-born children could not take any interest or title in said lands as described in said deed; and that the defendant, Laura L. Worthington, will acquire a good and indefeasible title under said deed as tendered.

It is therefore ordered, adjudged and decreed that the said Olivia Cunningham and her two children, Robert Cunningham and Ray Cunningham, are the owners in fee, tenants in common of the lands described in said deed executed and delivered by Marcellus Sutton and wife, Laura Sutton, as hereinabove referred to, subject to the life estate of Laura Sutton; and that the said Leon Cunningham, commissioner, appointed by the court under said special proceeding for the sale of said lands, has full power to convey said lands in fee simple to the said Laura L. Worthington, the defendant, and the said Leon Cunningham, commissioner, is directed to execute and deliver a deed conveying said lands in fee simple to the defendant, Laura L. Worthington, upon the payment of said purchase price of $6,800, which shall also be binding and shall operate as a conveyance upon the part of said minors. And it is further ordered and decreed that this judgment shall and does hereby operate as a bar of right to any interest or title in said lands in any child or children of the said Olivia Cunningham, who were not born, or in *ventre sa mere,* at the date of the execution and delivery of the said deed from Marcellus Sutton and wife, Laura Sutton, to Olivia Cunningham on 5 June, 1919."

Pittman & Eure for plaintiffs.
M. B. Prescott for defendant.

BROGDEN, J. If a deed is duly executed and delivered, conveying land to a woman and "her children," reserving a life estate to the grantors, do children born or in being at the time of the conveyance take the land as tenants in common with the mother, or do all the children born or in being at the termination of the reservation, take as tenants in common with the mother?

The question of law presented has been expressly decided in *Cullens v. Cullens,* 161 N. C., 344, 77 S. E., 228, where the principle was thus declared: "We think it well settled that where land is conveyed, as in this case, to a woman and her children, they take as tenants in common, and only those born at the date of the deed take, unless there is one in *ventre sa mere,* and then such child would also take; but that fact did not exist in this case." *Benbury v. Butts,* 184 N. C., 23, 113 S. E., 499; *Ziegler v. Love,* 185 N. C., 40, 115 S. E., 887; *Boyd v. Campbell,* 192 N. C., 398, 135 S. E., 121.

WOODLEY TILGHMAN v. H. S. HANCOCK AND GEORGE PATE.

(Filed 27 March, 1929.)

1. **Adverse Possession—Actions—Deeds as Evidence.**

   Where the defendant relies upon his open, continuous, and adverse possession of timber lands for twenty years or more to establish his title, and not upon color of title, it is not error for the trial court to admit in evidence his deed to the land from the one under whom he claims as a circumstance in connection with the other and sufficient evidence, and when the evidence is conflicting the issue is for the jury to determine.

2. **Adverse Possession—Nature and Requisites—Possession—Deeds—Presumptions.**

   There is no presumption of law that a claimant to land enters into possession under his deed thereto, and a deed alone is insufficient evidence of possession under claim of twenty years adverse possession.

CIVIL ACTION, before *Grady, J.*, at November Term, 1928, of LENOIR.

The plaintiff alleged that he was the owner of the land in controversy, and that the defendant, Hancock, was committing a trespass thereon by cutting timber. Plaintiff sought to establish title by proof of adverse possession for the statutory period. The evidence tended to show that the grandfather and the father of the plaintiff had been in possession of the property for more than twenty years prior to the commencement of the action. The land in dispute was woodland, and the plaintiff further offered evidence tending to show that his father had cut and sold cross-ties, posts, piling and wood, and had also taken for his own use various quantities of lightwood for a period of years. A brother of plaintiff testified that "we went in there three or four dozen times each winter." There was further evidence that the grandfather of plaintiff had sold timber from the land in 1890 or 1891.

The issue was as follows: "Have the plaintiff and those under whom he claims title, been in open, notorious, hostile and continuous possession of the land in controversy, under known and visible boundaries, twenty years prior to the commencement of this action?" The jury answered the issue "Yes," and judgment was rendered for the plaintiff, from which judgment defendant appealed.

Rouse & Rouse for plaintiff.

Cowper, Whitaker & Allen and Thomas J. White, Jr., for defendants.

BROGDEN, J. The plaintiff offered in evidence a deed from his father and mother to himself, dated 21 April, 1920, and duly recorded 15 May, 1920, purporting to cover the land in controversy. This action was brought about 21 April, 1925. A map referred to in the deed was also offered in evidence. The court instructed the jury that the deed was "not in itself evidence of title, but is allowed to be considered in connection with other evidence." The defendant objected to the introduction of this evidence.

It is apparent that neither the map nor the deed was offered as substantive evidence. The plaintiff did not claim that the deed was color of title as contemplated by the law, but asserted that the deed was a circumstance tending to show the good faith of his claim. There is no presumption of law that a purchaser takes possession under a deed. *Prevatt v. Harrelson,* 132 N. C., 250, 43 S. E., 800. Therefore, the deed of itself was not sufficient evidence of possession. As the deed was made before the controversy arose, the execution and recording thereof would be a relevant fact in connection with other sufficient evidence tending to show a claim of title and adverse possession. Though not sufficient of itself for that purpose, under the circumstances the deed would be analogous in probative weight to the listing of land and the payment of taxes thereon. *Austin v. King,* 97 N. C., 339, 2 S. E., 678; *R. R. v. Land Co.,* 137 N. C., 330; 49 S. E., 350; *Christman v. Hilliard,* 167 N. C., 4, 82 S. E., 949.

The general rule with respect to the character of possession in such cases is thus stated in *Cross v. R. R.,* 172 N. C., 119, 90 S. E., 14: "This possession need not be unceasing, but the evidence should be such as to warrant the inference that the actual use and occupation have extended over the required period, and that during it the claimant has from time to time continuously subjected some portion of the disputed land to the only use of which it was susceptible." The plaintiff offered sufficient evidence to bring the case within the rule. The defendants offered evidence to the contrary, but the weight of the evidence was for the jury.

Exception was taken by the defendants to certain testimony of a surveyor, but the record discloses that testimony of the same nature as that objected to was given by the witness without objection in other portions of the testimony. Hence this exception cannot be sustained.

There are other exceptions in the record, but we do not think any of them warrant a new trial.

Upon the whole, the case presents disputed facts, and the jury has found those facts in favor of the plaintiff.

No error.

S. B. PEEL ET AL. v. VANCE L. PEEL.

(Filed 27 March, 1929.)

Deeds and Conveyances—Construction and Operation—Conditions and Covenants.

Under the provisions of a deed to lands to a son from his parents, reserving a life estate in the grantors, that a certain amount of money be paid to the grantors' other children in six months after the grantors' death: *Held*, the grantee in accepting the deed is bound by its provisions and covenants.

CIVIL ACTION, before *Moore, Special Judge,* at November Special Term, 1928, of MARTIN.

On 29 January, 1920, James H. Peel and his wife, Victoria Peel, executed and delivered to the defendant, Vance L. Peel, their son, a fee-simple deed for a tract of land containing 80 acres. The grantors reserved a life estate and were both dead at the time the action was instituted. The clause in the deed out of which the controversy grows is as follows: "That the said James H. Peel and wife, Victoria Peel, in consideration of twelve hundred dollars to Fannie A. Peel Hardison, S. B. Peel and Susan H. Peel Oliver, to be paid by Vance L. Peel within six months after our death, the receipt of which is hereby acknowledged, have bargained and sold," etc. Fannie Peel Hardison, S. B. Peel and Susan H. Peel Oliver were the children of the grantors and brother and sisters of the grantee, and are the plaintiffs in this action. At the time the deed was executed the defendant, grantee therein, executed three notes of $400.00 each, payable six months after the death of the grantors to each of the plaintiffs.

Defendant offered evidence to the effect that after the execution of the deed he went in possession of the land, but that he took care of his father and mother, the grantors in said deed, until the death of each of said grantors, and that the grantors agreed that if the defendant would care for them until death he would not be required to pay the consideration of $1,200.00 mentioned in the deed or the notes executed contemporaneously therewith. It further appears from the evidence that the notes of $400.00 each were not delivered to the plaintiffs by the grantors.

The issues and answers of the jury thereto were as follows:

1. Did deceased, J. H. Peel, at the date of the execution of the deed from himself and wife to the defendant, Vance L. Peel, have said Vance L. Peel execute three promissory notes, each in the sum of $400.00, payable to plaintiffs, S. B. Peel, Fannie A. Hardison, and Susan Oliver, payable six months after death of said James H. Peel and wife? Answer: Yes.

2. Did the said J. H. Peel retain possession of any kind or control of said notes? Answer: Yes.

3. Were said notes or either of them, delivered to plaintiffs, or either of them? Answer: No.

4. Was it agreed between said J. H. Peel and Vance L. Peel at the time of the execution of said deed, and said notes, that in the event said Vance L. Peel would care for and provide for said J. H. Peel and wife, during their lifetime, that said notes would be surrendered to Vance L. Peel and obligation to pay same and consideration in the deed canceled? Answer: No.

5. Did the defendant, Vance L. Peel, care for and provide for said J. H. Peel and wife, Victoria Peel, during their lifetime after said deed was made? Answer: Yes.

6. Did J. H. Peel surrender said notes to said Vance L. Peel with the purpose of canceling same? Answer: No.

7. In what amount, if any, is the defendant indebted to the plaintiffs? Answer: $1,200 and interest from 8 June, 1926.

From judgment upon the verdict decreeing that the plaintiffs recover $1,200.00, with interest, the defendant appealed.

Wheeler Martin and B. A. Critcher for plaintiffs.
A. R. Dunning and Harry McMullan for defendant.

BROGDEN, J. The plaintiffs based their cause of action upon the covenants and stipulations contained in the deed and not upon the notes. Hence the principle of law with respect to gifts *inter vivos* does not apply. The correct rule governing the present controversy is stated in *Herring v. Lumber Co.,* 163 N. C., 481, 79 S. E., 876, as follows: "It is very generally held here and elsewhere that the grantee in a deed poll, containing covenants and stipulations purporting to bind him, becomes bound for their performance, though he does not execute the deed." *Maynard v. Moore,* 76 N. C., 158; *Fort v. Allen,* 110 N. C., 183, 14 S. E., 685; *Helms v. Helms,* 135 N. C., 164, 47 S. E., 415; *Guilford v. Porter,* 167 N. C., 366, 83 S. E., 564; *Hill v. Hill,* 176 N. C., 194, 96 S. E., 958; *Adams v. Wilson,* 191 N. C., 392, 131 S. E., 760.

The facts disclosed by the record bring the case at bar within the established rule, and the judgment rendered is approved.

No error.

F. K. ELLINGTON v. RALEIGH BUILDING SUPPLY COMPANY.

(Filed 27 March, 1929.)

1. **Corporations—Stock—Preferred Stock—Priority—Creditors.**

Our statute, C. S., 1156, and the amendments thereto, fixes the authority of a corporation formed thereunder to issue its preferred stock and the priorities thereof are always subject to the rights of creditors, and an attempt of the corporation to give the preferred stockholders a lien upon its realty in the nature of a mortgage or deed of trust under the provisions of its charter granted to it under the general law, the lien so attempted is inoperative as to the statutory prior right given the creditors of the corporation.

2. **Mortgages—Registration—Priority—Corporations.**

Where preferred stockholders of a corporation are given a priority over creditors by an agreement in its charter and certificates of stock giving the holders thereof a lien on its realty, even if the agreement be construed as a mortgage, it is inoperative as to creditors without compliance with our statute requiring registration. C. S., 3311.

APPEAL by Mrs. M. M. Holding from *Harris, J.*, at Second November Term, 1928, of WAKE. Affirmed.

Upon the hearing it was admitted by the parties:

"(1) The Raleigh Building Supply Company was incorporated 25 February, 1920, under the laws of the State of North Carolina, the incorporators being G. S. Vaught, F. K. Ellington, Graham H. Andrews and John W. Thompson.

(2) That said corporation had a paid in capital stock of $50,000, of which $30,000 was common stock and $20,000 was denominated preferred stock.

(3) That the proceeds of sale of stock was used in the purchase from Amzi Ellington, executor of the lumber plant owned by the W. J. Ellington Estate at $21,500 in cash and $1,500 in preferred stock, which lumber plant included the real estate in controversy, and a lot of machinery and equipment; that there was no segregation of the funds derived from the sale of preferred stock (unless paragraph 5 of the charter of said corporation segregated it), but same was paid for as hereinbefore stated; that deed to said real property was duly executed to said corporation dated 28 February, 1920, and recorded in Book 354, page 397, registry for Wake County.

(4) That all the real estate ever owned by Raleigh Building Supply Company was purchased from Amzi Ellington by said Raleigh Building Supply Company, and said property was situate on Harrison Avenue, Raleigh, North Carolina, and was known as the Ellington Lumber Company property.

(5) That Mrs. M. M. Holding paid to said corporation on 1 March, 1920, the sum of seven thousand dollars ($7,000) in cash, and there was issued and delivered to Mrs. Holding by said corporation Certificate No. 2, representing seventy (70) shares, denominated as preferred stock of said Raleigh Building Supply Company of the par value of $100 each, which said certificate was issued pursuant to paragraph 5 of the charter of said corporation, which contained the following provisions:

'5. The preferred stock shall be nonvoting stock, and bear cumulative seven per cent dividends ($3\frac{1}{2}$ semiannually), payable prior to any dividends on common stock; and, further, said preferred stock shall be callable for retirement and cancellation at the option of the corporation by its directors, after five years, at $115 per share and any dividends cumulated and unpaid, upon thirty days notice to holders of record at any dividend period. It is further provided that the holders of said shares of the preferred stock shall have and to them is hereby conveyed in trust a first lien upon the real estate of the corporation purchased of Amzi Ellington, executor, being known as the Ellington Lumber Plant—but not the machinery or equipment therein—for the purpose of securing the payment of said holders of the face value of each of said shares and accumulated dividends thereon. The incorporators of this company hereby declare themselves, their successors and assigns, trustees of the said real estate of this corporation, acquired for the purpose herein set out. And it is further provided that all common stock of this corporation, issued or to be issued shall be issued subject to the said trust.'

(6) That upon payment of $7,000 in cash by said Mrs. M. M. Holding, 1 March, 1920, the following certificate was issued and delivered to her the same being the form of certificate used by said corporation for said purpose, to wit:

'No. 2. Seventy shares.

Incorporated Under the Laws of the State of North Carolina,

Raleigh Building Supply Company,

Raleigh, North Carolina.

This certifies that Mrs. M. M. Holding is the owner of Seventy Shares of the par value of $100 each, fully paid, of the Preferred Capital Stock of .... Raleigh Building Supply Company .... transferable only on the books of the Company by the holder hereof, in person, or by duly authorized attorney, upon the surrender of this certificate.

PREFERRED.

The holders of the Preferred Stock are entitled to receive when, and as declared out of the surplus or net profits of the Company, dividends at the rate of seven per cent per annum, payable semiannually, before any dividend shall be set apart or paid upon the Common Stock. The dividends of the Preferred Stock shall be cumulative from and after 1 July, 1920, and shall not bear interest. The Board of Directors may pay dividends upon the Common Stock provided the dividends upon the Preferred Stock, with all accumulations, including accrued dividends, to the date of the payment of the Common Stock dividend shall have been declared and shall have been paid in full, or a sum sufficient for the payment shall have been set apart for that purpose, but not otherwise. In case of liquidation or dissolution of the Company, the holders of the Preferred Stock shall be entitled to be paid in full, both the par amount of their shares and the accrued dividends, before any amount shall be paid to the holders of the Common Stock, but after such payment the remaining assets shall be paid to the holders of the Common Stock according to their respective shares. The holders of the Preferred Stock are entitled to a first lien upon such real estate assets of this Company, as more fully appears in the charter of said Company, filed in the office of the Secretary of State, 24 February, 1920. The Preferred Stock shall be nonvoting stock, but is subject to redemption, at the option of the Company, after five years at $115 and accrued dividends, at any dividend period, upon thirty days' notice to stockholders of record.

In Witness Whereof, The said corporation has caused this certificate to be signed by its duly authorized officers, and to be sealed with the seal of the said corporation at Raleigh, N. C., this 1 March, 1920.

(Signed) G. S. VAUGHT, *President.*

(Signed) JNO. W. THOMPSON, *Secretary.* (Seal.)

Shares $100 Each. Shares $100 Each.'

(7) That said Mrs. M. M. Holding would not have subscribed for said shares but for the provisions of paragraph 5 of the charter of said corporation, and did subscribe and pay for seventy shares of the said preferred stock.

(8) That all of the accounts of the general creditors were contracted by the corporation subsequent to the issuance of the shares denominated as preferred stock to Mrs. Holding.

(9) That the charter of said corporation was duly recorded in the office of the clerk of the Superior Court of Wake County as provided by law.

(10) That while said corporation was being operated by its officers and directors, to wit, about 26 May, 1920, said company arranged to borrow the sum of $19,500 from the Citizens National Bank, the proceeds of loan being used in the operation of said business and in order to secure the loan aforesaid, each of the officers and directors of said company were required by said bank and did personally guarantee payment to said bank and become personally liable therefor.

(11) That Graham H. Andrews was one of the incorporators of said Raleigh Building Supply Company and was at all times during the existence of the said company director of the same, and also was throughout said time, and is now an officer of the Citizens National Bank, to wit, its cashier.

(12) That Graham H. Andrews, cashier of said bank and director of said company, did not personally negotiate for, make, nor obtain said loan.

(13) That all of the accounts of the general creditors were contracted by the corporation subsequent to the issuance of the shares to Mrs. Holding denominated preferred stock aforesaid.

(14) That said corporation became insolvent and, on or about 15 June, 1922, J. C. Little and R. W. Kennison were appointed receivers thereof.

(15) That the officers and directors of said corporation at said time were G. S. Vaught, Jno. W. Thompson, G. H. Andrews, F. K. Ellington, P. H. Busbee and W. G. Briggs.

(16) That said receivers, acting under direction of the court, have applied personal property assets upon the indebtedness of said corporation, and duly filed their reports from time to time, all of which have been approved by the court and have distributed approximately the sum of $33,000.

(17) The unpaid claims against said corporation (not including balance of costs of administration) of thirty-nine general creditors now amount to $19,517.12, including the balance of $9,495.56 due the Citizens National Bank on the aforesaid note, and there are no assets to be applied thereon except the proceeds from sale of said real property.

(18) That acting under further orders of the court, said receivers sold the real property of said company for $13,600 cash, which sale was duly confirmed, and said money is now being held by said receivers for disbursement.

(19) That the proceeds of sale will not be sufficient to pay the claims of the thirty-nine general creditors in full; that no dividends have ever been declared or paid on the common stock of said corporation.

(20) That said Mrs. Holding filed notice with the receivers alleging preferred claim to the said proceeds of sale of land for that under the

said certificate issued her and the provisions therein and paragraph 5 of said charter, she was in fact a creditor, and title to the real estate was in the incorporators and their successors as trustees for payment of such indebtedness before said land or any part of the proceeds thereof could be applied to the amounts due general creditors, including the corporation's debt to the Citizens National Bank, as set forth in Exhibit 'A.'

Assignments of Errors: (1) The court erred in holding that the said Mrs. M. M. Holding did not have a prior lien over general creditors of said corporation on the funds derived from a sale of the old Ellington Lumber Company land described in paragraph 5 of the charter of said Raleigh Building Supply Company. (2) The court erred in signing the judgment appearing in the record."

Clyde A. Douglass and Pou & Pou for Mrs. M. M. Holding.

Briggs & West and Philip H. Busbee for receiver and general creditors.

CLARKSON, J. *The question involved:* Has Mrs. M. M. Holding, who holds a certificate for seventy shares of stock in defendant company of the par value of $100 a share, fully paid, denominated preferred stock in the certificate, by reason of stipulations in defendants' charter and referred to in the certificate a first lien on the real property of the defendant, superior to the general creditors of defendant company which is insolvent? We think not.

The provision in the charter (a): "It is further provided that the holders of said shares of the preferred stock shall have and to them is hereby conveyed in trust a first lien upon the real estate of the corporation purchased of Amzi Ellington, executor, being known as the Ellington Lumber Plant—but not the machinery or equipment therein—for the purpose of securing the payment to said holders of the face value of each of said shares and accumulated dividends thereon. The incorporators of this company hereby declare themselves, their successors and assigns, trustees of the said real estate of this corporation, acquired for the purpose herein set out. And it is further provided that all common stock of this corporation, issued or to be issued, shall be issued subject to the said trust."

In the certificate of stock (b): "The holders of the Preferred Stock are entitled to a first lien upon such real estate assets of this company, as more fully appears in the charter of said company filed in the office of the Secretary of State, 24 February, 1920."

Part C. S., 1156, and amendments, is as follows: "Every corporation has power to create two or more kinds of stock of such classes, with such designations, preferences, and voting powers or restriction or qualifications thereof as are prescribed by those holding a majority (two-thirds in the case of banks and building and loan associations) of its outstanding capital stock; and the power to increase or decrease the stock as herein elsewhere provided applies to all or any of the classes of stock; and the preferred stock may, if desired, be made subject to redemption at not less than par, at a fixed time and price, to be expressed in the certificate thereof; and the holders thereof are entitled to receive, and the corporation is bound to pay thereon, a fixed yearly dividend, to be expressed in the certificate, payable quarterly, half-yearly, before any dividend is set apart or paid on the common stock, and such dividends may be made cumulative. *In case of insolvency, its debts or other liabilities shall be paid in preference to the preferred stock,"* etc. N. C. Code, 1927, sec. 1156.

Corporations are artificial beings and are organized to do business in accordance with the statutory provisions of the law on the subject. The powers, rights, duties and liabilities are fixed by statute and they are creatures of the law. Every one dealing with a corporation does so with the express or implied limitations imposed by statute. It has the power to issue *preferred stock,* but *"In case of insolvency its debts, or other liabilities shall be paid in preference to preferred stock."*

If it is admitted that the charter is in the nature of a mortgage, yet it was not duly probated and recorded in the office of the register of deeds, where the land was situate.

C. S., 3311 is as follows: "No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lies; or in case of personal estate, where the donor, bargainor or mortgagor resides; or in case the donor, bargainor or mortgagor resides out of the State, then in the county where the said personal estate, or some part of the same, is situated; or in case of choses in action, where the donee, bargainee or mortgagee resides. For the purposes mentioned in this section the principal place of business of a domestic corporation is its residence." In construing the registration laws of this State, this Court has consistently held that no notice, however full and formal, will supply the place of registration. *Whitehurst v. Garrett, ante,* 154; *Mills v. Kemp, ante,* 309; *Salassa v. Mortgage Co., ante,* 501; *Weeks v. Adams, ante,* 512.

As between the parties, a mortgage is valid without registration, but not so as to creditors. Preferred stock has priority as between common and preferred, but not as to creditors. (See *Redrying Co. v. Gurley,* 197 N. C., 56.) It will be noted that the last part of section 5 of the charter says: "And it is further provided that all common stock of this corporation issued or to be issued shall be issued subject to the said trust." The *charter* declares and fixes the trust concerning the land to be for the preferred stock and the common stock is subject to that trust, but the *statute* declares that in case of insolvency, debts of the corporation are given preference over the *preferred stock.*

A preferred stockholder, under the charter and statute provision, has certain preferences as against the common stock, but not as against creditors.

In *Power Co. v. Mill Co.,* 154 N. C., at p. 77, citing numerous authorities, it is said: "At one time it was a matter of discussion as to whether a preferred stockholder had any rights as a creditor of the corporation or could properly be classified as such. But the law is now clearly settled and beyond dispute that a preferred stockholder is not a creditor, and must be confined to his rights as a stockholder." *Cotton Mills v. Bank,* 185 N. C., 7.

When a statute gives the preferred stock a prior lien as to creditors or makes a preferred stockholder a creditor, then other creditors are bound by the statute, but in this State there are no such statutes, but the statute is to the contrary. The charter could not give this preference in the teeth of the clear language of the statute. The charter of incorporation is subject to the statute. So even if the charter was in the nature of a mortgage and duly probated and recorded, the status of the preferred stockholder was not that of a creditor and the preferred stockholder would not have preference under the statute as against a creditor. Because the charter is issued by the Secretary of State gives no special efficacy, but the provisions of the charter must be subject to the statute as written. Water cannot rise above its source. The preferred stockholder in this action, under its charter, had a special preference over the common stock (1) bear cumulative seven per cent dividends (3½ semiannually), (2) shall be callable for retirement and cancellation at the option of the corporation by its directors after five years at $115 per share, and any dividend cumulated and unpaid upon 30 days notice to holders of record at any dividend period." How can it be contended that the holder of the preferred stock had the status of a creditor? The whole transaction would be usurious under the usury laws of this State if this contention was correct. The usury statute and decisions answer this contention. *Pratt v. Mortgage Co., ante,* 294. The cases cited by appellant are bottomed ordinarily only on *statutes* and different from the statute in this State. For the reasons given, the judgment below is

Affirmed.

MAVIS BOTTLING COMPANY OF GOLDSBORO, INCORPORATED, v. R. A. DOUGHTON, COMMISSIONER.

(Filed 27 March, 1929.)

Taxation—Liability of Persons and Property—License Taxes—Bottling Companies.

Under the provisions of the Revenue Act, Public Laws of 1927, ch. 80, sec. 134(a), requiring a license for "manufacturing, producing, bottling or distributing" soft drinks, and requiring a license for wholesaling by sec. 134(b), etc., providing that if the tax has been paid on any of these articles, machinery or equipment units under sec. 134(a), the tax levied on wholesaling shall not apply: *Held,* where the bottling of the beverage is done at a company's home office in this State and, at its expense of delivery and storage, sent to warehouses owned by it for distribution in other cities and towns herein, each of these distributing points is liable for the payment of the license tax, and does not come within the intent and meaning of the exempting provision.

APPEAL by plaintiff from *Harris, J.* At Chambers, 7 September, 1928. From NEW HANOVER. Affirmed.

Controversy without action upon the following facts:

1. The plaintiff is a corporation engaged in the business of bottling, selling, and distributing a soft drink known as Mavis. It has an office in Wilmington, but its principal office is in Goldsboro.

2. The defendant is the Commissioner of Revenue.

3. That at the time the plaintiff began the business of bottling and distributing the above-named soft drink at and from its plant at Goldsboro, it applied to and obtained from the defendant a license to engage in such business, and paid to the defendant the sum of $225 covering said license and privilege of engaging in the business of bottling, selling and distributing the soft drink known as "Mavis."

4. That all of the machinery and equipment owned and used by the plaintiff in its bottling business is situated at and contained in its plant at Goldsboro, and that all of its bottling business is conducted in said plant; that the syrup and ingredients used in connection with the bottling of the soft drink called "Mavis" is furnished to the plaintiff by the Mavis Bottling Company of America.

5. That after the said soft drink is bottled and crated at plaintiff's Goldsboro plant, plaintiff, with its own trucks, by its own employees, and at its own expense, transports from time to time certain quantities of said bottled goods and stores the same in rooms or warehouses owned or leased by plaintiff in certain cities and towns within the State of North Carolina, as follows, to wit: Goldsboro, Wilmington, Elizabeth City, New Bern, Durham, Wilson, Raleigh, Jacksonville, Henderson,

Washington, Whiteville, and Wallace, and from the plaintiff's storage rooms and warehouses, in the above-named cities and towns the said bottled drink is distributed by plaintiff's own employees to the retail trade, and that at no time from the beginning of the bottling operation until the product is sold to the retail trade, does the ownership and control thereof pass from the hands of plaintiff and no other person, firm or corporation has any control over or interest in the same.

6. That after the storing in plaintiff's warehouses of quantities of the bottled drink above mentioned, in the above-named cities and towns, the said product is placed in the care and custody of plaintiff's own employees and cared for at plaintiff's own expense, and by plaintiff's employees sold and disposed of to the retail trade; that the entire business of bottling, transporting, storing, handling, selling and distributing the said bottled drink is done entirely by plaintiff with its own machinery, equipment and employees at its own expense and placed in and distributed from its own storerooms and warehouses.

7. That after the plaintiff began the bottling and the distributing of "Mavis" in North Carolina, and after plaintiff had paid to the defendant the sum of $225 hereinbefore stated, in addition thereto the defendant demanded of the plaintiff and assessed against it, and required the plaintiff to pay for the privilege of distributing "Mavis" in the above-mentioned towns and cities sums aggregating $1,250.

8. That after the defendant made said additional assessments aggregating $1,250, as set out in the preceding paragraph, plaintiff paid to the defendant the said additional taxes over and above the amount which the plaintiff had paid to the defendant for the privilege of doing business in North Carolina at the time it entered into said business, and when the said additional payments of $1,250 were required from plaintiff by the defendant, the plaintiff made said payments under protest and within thirty days thereafter plaintiff demanded in writing that the defendant return and refund to the plaintiff the said additional sums aggregating $1,250 in accordance with the provisions of the statute in such case made and provided, and that the defendant has failed and refused to return and refund said amount within ninety days from date of payment, and the defendant still refuses to return to the plaintiff and refund to it the said sums aggregating $1,250.

Upon the agreed facts it was adjudged that the plaintiff recover nothing of the defendant and that the defendant recover his costs. The plaintiff excepted and appealed.

Bryan & Campbell for plaintiff.

Attorney-General Brummitt and Assistant Attorney-General Nash for defendant.

ADAMS, J. The plaintiff, a corporation having its principal office in the city of Goldsboro, is engaged in the business of bottling, selling, and distributing a soft drink known as "Mavis." After the drink is bottled and crated in the plant at Goldsboro, the plaintiff, at its own expense and upon its own trucks, transports quantities of the bottled product to its warehouses in other cities and there stores it until it is distributed by the plaintiff's employees to the retail trade. The plaintiff paid the defendant $225 as a license tax for the privilege of carrying on its business and $1,250 for the privilege of distributing the drink in bottles. The latter tax was paid under protest and suit was brought for its recovery. C. S., 7979. The solution of the controversy turns upon the construction of certain sections of chapter 80 of the Public Laws 1927, entitled "An Act to Raise Revenue."

Section 134(a) provides: "Every person, firm, corporation, or association manufacturing, producing, bottling and/or distributing in bottles or other closed containers, soda water, Coca-cola, Pepsi-cola, Chero-cola, ginger ale, grape and other fruit juices or imitations thereof carbonated, or malted beverages and like preparations commonly known as soft drinks, shall pay a license tax for the privilege of doing business in this State under the following schedule."

The material part of section 134(b) is as follows: "Every person, firm, corporation or association distributing, selling at wholesale, or jobbing bottled beverages as enumerated in subsection (a) of this section shall pay an annual license tax for the privilege of doing business in this State as follows: . . . *Provided,* that where the tax levied under subsection (a) of this section has been paid on any of the articles, machines or equipment units enumerated therein, the tax levied under this subsection shall not apply; *Provided further,* that only one tax shall be collected from any person, firm, corporation or association distributing, selling at wholesale, or jobbing any of the articles enumerated in this subsection."

Subsection (a) requires a license tax for the privilege of manufacturing, bottling and distributing soft drinks in bottles or other closed containers. In subsection (d) it is provided that only one State tax shall be assessed and collected under the provisions of this section. Subsection (a) includes the business of "manufacturing, producing, bottling and/or distributing." Each of these may be regarded as a business separate and distinct from the others; but when all of them are carried on at one place only one State tax shall be assessed, as subsection (d) provides. Suppose the plaintiff should pay a tax for the privilege of manufacturing the beverage at Goldsboro, where it has its principal office, and should engage also in the business of distributing the bottled product by wholesale at the same place; an additional tax for distribution there could not be collected because it is prohibited by subsection (d). But section 100 provides that if the business which is taxable under Schedule B is carried on at two or more separate places, a separate license for each place of business shall be required. According to the agreed case the beverage is put into bottles at Goldsboro and carried thence to several other cities and stored in warehouses; and from these warehouses it is distributed to the retail trade. Selling to the retail trade from each of these warehouses constitutes a distribution of the manufactured product within the contemplation of subsection (b).

The second proviso in this subsection was evidently intended to make distributing, jobbing and selling at wholesale a single business for which only one tax should be collected; it was not intended, in our opinion, to provide for the payment of only one tax without regard to the number of places in which the business is conducted. As to the first proviso it may be said that so far as the record discloses the tax levied under subsection (a) has not been paid on the equipment units enumerated therein. The judgment is

Affirmed.

MARY W. WILKIE v. H. B. STANCIL AND GILMERS, INCORPORATED.

(Filed 27 March, 1929.)

Master and Servant—Master's Liability for Injuries to Third Persons—Scope of Employment.

The liability of the master in damages for the negligent acts of the servant extends only to such acts that occur within the scope of the servant's duties or in furtherance thereof, and where the evidence tends only to show that the injury in suit was caused by the servant in going in his automobile to his master's store on a holiday to light the lights therein, without further duty to perform on that occasion, a motion for judgment as of nonsuit thereon is properly granted, and the servant's intention of performing an insignificant, gratuitous service when he reached the store, not requested or required of him by the master, does not vary this result.

APPEAL by plaintiff from *Grady, J.*, at January Special Term, 1929, of WAKE. No error.

On 25 December, 1926, at 6 p.m., the defendant, Stancil, while driving his automobile from his home on Salisbury Street to the store of Gilmers, Inc., ran over the plaintiff at the intersection of Edenton and Halifax streets and injured her. She brought suit against both defendants, alleging that she had been injured by the negligence of Stancil, and that he was the employee and servant of Gilmers acting within the scope of his employment at the time of the injury. Upon issues joined by the pleadings the jury found that the plaintiff had been injured by the negligence of Stancil, but not by the negligence of Gilmers, and that the plaintiff had not by her own negligence contributed to her injury, and awarded damages in answer to the fourth issue. Judgment was rendered against Stancil only, and the plaintiff excepted and appealed.

F. T. Bennett and Bailey & Weatherspoon for plaintiff.
Biggs & Broughton for Gilmers, Incorporated.

ADAMS, J. His Honor instructed the jury if they believed the evidence and found the facts to be as stated by Stancil, the only witness on the subject, to find in response to the second issue that the plaintiff had not been injured by the negligence of Gilmers. The question is whether there was error in this instruction.

In paragraph ten of the complaint it was alleged: "That Gilmers, Incorporated, employed the defendant, H. B. Stancil, as superintendent of its store building, and it was contemplated at the time of his said employment and under instructions given said Stancil by the manager of said store, that the said Stancil should go to said store on holidays about night time for the purpose of turning on the lights for the benefit and protection of the defendant, Gilmers, Incorporated; that 25 December, 1926, the time complained of, was a holiday; that the place of business of Gilmers, Incorporated, had not been opened that day and that H. B. Stancil was at the time complained of herein on his way to the store for the purposes aforesaid."

This was admitted. It was also admitted that no delivery of goods for Gilmers was made by Stancil or any other person on 25 December. It was a legal holiday and the store was closed. When Stancil went to the store early in the morning to turn off the lights he made search for a toy which had not been delivered to the purchaser, and failing to get it tried to find a man named Wingo, who operated the Merchants Delivery Company, and who should have delivered it; but he did not get in communication with him. Stancil went home about noon and remained there with his family until about six o'clock. He owned a car which he used regularly in going to and from his work. Under instructions he used it in times of emergency for the delivery of goods; but he had not been instructed to open the store at Christmas to deliver the toy. The direct inquiry is whether at the time of the alleged injury he was engaged in the prosecution of his employer's business so as to make the employer liable for his negligence.

The test is whether Stancil at the time of the injury was acting within the scope of his employment—whether he was engaged in the furtherance of his employer's business. *Sawyer v. R. R.,* 142 N. C., 1; *Butler v. Mfg. Co.,* 182 N. C., 547; *Gallop v. Clark,* 188 N. C., 186. There is no evidence that Gilmers retained the right to say how he should travel in going to and from the store. He had bought the car for "his own use in going backward and forward." Gilmers had no interest in it and no control over it except "in times of emergency when used under Cooper's instructions."

It was held in *Linville v. Nissen,* 162 N. C., 95, 101, that the doctrine of *respondeat* superior applies only when the relation of employer and employee "is shown to exist between the wrongdoer and the person sought to be charged for the result of the wrong *at the time and in respect* to the transaction out of which the injury arose." This familiar principle which has been recently applied in a number of cases does not require at this time a full or elaborate discussion. *Bilyeu v. Beck,* 178 N. C., 481; *Reich v. Cone,* 180 N. C., 267; *Grier v. Grier,* 192 N. C., 760; *Peters v. Tea Co.,* 194 N. C., 172.

Upon the admitted facts Stancil was not engaged in the furtherance of his master's business at the time of the injury. His sole duty was to turn on the lights; this duty could not be performed by him before he arrived at the store. Upon his arrival there he was to enter upon the discharge of the specific duty he was to perform on holidays, and his mode of traveling was his personal affair. To permit a recovery against Gilmers under these circumstances would be to enlarge the rule of *respondeat* superior to such an extent as to make the master liable for every negligent act his servant might commit while going to or from his place of work, though transported in a vehicle of his own selection over which the master had no control and in which he had no interest.

We are not inadvertent to Stancil's saying that as he came down the street he "was intending" to make a search in the building for the lost package and "was intending" to look for Wingo; but in fact he searched neither for the package nor for Wingo, and his purpose or intention did not determine the legal relation which at that time existed between him and his employer. He testified, "I would not have gone back to Wingo's that night, and I might have tried to straighten out those packages if I had not had this trouble." But at the time the injury occurred he had not found the package and was not engaged in delivering it.

The cases cited by the appellant which hold that the master may be liable if his servant's automobile is habitually used in the master's business, we think, have no application to the facts disclosed by Stancil's testimony; the car was used in the service of Gilmers, not habitually, but on occasions of necessity. A comparison of the facts in each of these cases with the facts in the present case will readily show wherein they may be distinguished.

The appellant's brief contains this statement: "The weight of authority holds that where one is returning to his employer's place of business to resume his duties he has returned to the pursuit of his master's business from the time he begins the journey to the master's place of business." This statement is too broad to be strictly accurate. It must be examined in the light of the cases cited in its support. These cases show that the chauffeur was engaged in the operation of the master's car with his permission, if not under his positive direction, and are based upon facts entirely at variance with those disclosed by the evidence here.

We should profit little by reviewing and distinguishing the cited decisions of other courts, but we may refer to the two decisions of this Court on which the appellant seems to rely. In *Adams v. Foy,* 176 N. C., 695, it was shown that Workman, an employee of Foy & Shemwell, took from their garage in Lexington a car owned by one McIlvaine, drove it to Thomasville, and on the return caused the injury by a collision. When the plaintiff went to see Foy & Shemwell in reference to the payment of damages, Shemwell said that "he was not responsible for the troubles Workman got into while he was out." A motion for nonsuit was denied, the court holding that the phrase "while he was out" was susceptible of more than one construction and was to be determined by a jury. *Misenheimer v. Hayman,* 195 N. C., 613, raised the questions whether the truck was the property of the defendant and whether the driver was engaged in the prosecution of the defendant's business at the time of the injury. The truck bore the name of the defendant or the defendant's meat market and the defendant was engaged in the business of selling and delivering meat from his market. It was decided that these circumstances were evidence for the jury to consider.

In our case the evidence may reasonably be given only one construction: at the time of the injury Stancil was not engaged in the prosecution of his employer's business. Neither of the cases just referred to is inconsistent with the defendant's position. We find

No error.

STATE v. H. M. BEASLEY.

(Filed 27 March, 1929.)

Appeal and Error—Record—Matters to Be Shown by Record.

Where the record does not disclose that a verdict has been rendered on an offense charged or how the case was constituted in court, the action will be dismissed in the Supreme Court on appeal.

APPEAL by defendant from *MacRae, Special Judge,* at February Special Term, 1929, of ROBESON.

Proceeding to obtain a construction of chapter 62, Public Laws 1927, commonly known as the "Bad Check Law."

From a judgment requiring the defendant to pay a fine of $1 and the costs of the action, he appeals, assigning error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

F. D. Hackett, Jr., for defendant.

PER CURIAM. It is not clear from the record as to how this proceeding came into the Superior Court of Robeson County. A defective warrant, or one which fails to charge any offense under the statute, seems to have been issued by the recorder of the Rowland District, but no return appears on said warrant, and the record shows no trial or judgment in the recorder's court. The case on appeal states that, in the Superior Court, a jury trial was waived and the case submitted on an agreed statement of facts. There was no verdict of any kind, special or otherwise.

The whole proceeding is a nullity as well as an anomaly.

Action dismissed.

MILLS E. BELL v. J. A. BYRUM AND SCOTT B. PARKER.

(Filed 12 September, 1928.)

APPEAL by defendants from *Barnhill, J.,* at June Term, 1928, of PASQUOTANK. No error.

Ehringhaus & Hall for plaintiff.

Thos. J. Markham and McMullan & LeRoy for defendants.

PER CURIAM. The plaintiff brought suit to recover damages for alleged breach of a written contract under the terms of which the plaintiff was to furnish the defendants certain seed potatoes, fertilizer, barrels, and sufficient poison for the crop, and the defendants were to cultivate, tend, and gather the crop at maturity and make delivery thereof to the plaintiff at Elizabeth City "at such time in June, 1927, between the 5th and 15th, that the potatoes turn or yield fourteen to one, said digging in any event to be between said dates, except as otherwise provided." The defendants denied the material allegations of the complaint and set up a counterclaim. In response to the issues the jury found that the defendants had failed to comply with the contract, that the breach had not been waived by the plaintiff, and assessed damages both for the plaintiff and for the defendants on their counterclaim.

In our examination of the record we have discovered no reversible error.

No error.

W. G. COPPERSMITH AND J. B. LATHAM, TRADING AS LITTLETON FEED AND GROCERY COMPANY, v. R. L. COOK AND THE WARRENTON GROCERY COMPANY, INC., PARTNERS, TRADING AS R. L. COOK.

(Filed 19 September, 1928.)

APPEAL by plaintiff from *Daniels, J.*, at May Term, 1928, of WARREN.

Controversy without action, submitted on an agreed statement of facts, to determine the liability of the Warrenton Grocery Company for the debts of R. L. Cook, either as partner or principal and agent.

From a judgment exculpating the said Warrenton Grocery Company from liability for the debts of R. L. Cook upon the facts agreed, the plaintiff appeals, assigning error.

Jos. P. Pippen for plaintiff.
Williams & Banzet for defendant.

PER CURIAM. The judgment is correct. The case would be valueless as a precedent, hence the facts are not stated and no opinion will be written, other than this memorandum.

Affirmed.

FRANK BYERS v. W. P. ROSE.

(Filed 19 September, 1928.)

APPEAL by plaintiff from *Midyette, J.*, at May Term, 1928, of WILSON.

Civil action to recover damages for injury to plaintiff's eye, alleged to have been caused by the negligence of the defendant in failing properly to provide a reasonably safe place, or to furnish tools and appliances reasonably suitable for the work in which plaintiff and another, Robert Jones, as employees of the defendant, were engaged at the time, to wit, in removing wooden casings from concrete posts on the third floor of the new Wilson County courthouse.

Robert Jones was standing on a scaffold driving a wedge between two of the plank casings, for the purpose of prizing them off, when the scaffold gave way, caused him to miss the wedge, or to foul it, and his hammer flew off and injured the plaintiff who was standing on the opposite side of the post. The record is silent as to whether the hammer belonged to the defendant or Jones.

At the conclusion of all the evidence, upon motion of defendant, judgment of nonsuit was entered in the case, from which the plaintiff appeals, assigning error.

P. R. Hines, Lucas & Jennings and Troy T. Barnes for plaintiff.
Cale K. Burgess for defendant.

PER CURIAM. The plaintiff's injury seems to have been the result of an unfortunate accident, or at least we have not been able to discover any valid reason for disturbing the judgment of nonsuit on the record as presented.

Affirmed.

HANNAH ALLEN, ADMINISTRATRIX, v. CAROLINA TELEPHONE AND TELEGRAPH COMPANY.

(Filed 19 September, 1928.)

APPEAL by plaintiff from *Nunn, J.*, at February Term, 1928, of JOHNSTON.

Civil action to recover damages for an alleged wrongful death caused by the falling of a telephone pole while plaintiff's intestate was at the top of it, removing wires therefrom.

From a judgment of nonsuit entered on motion of the defendant at the close of plaintiff's evidence, plaintiff appeals, assigning error.

Jno. A. Narron and E. J. Wellons for plaintiff.
Gilliam & Bond and Ed. F. Ward for defendant.

PER CURIAM. We agree with the trial court that the evidence adduced on the hearing, and now appearing of record, was not sufficient to carry the case to the jury. It would serve no useful purpose to set out the testimony of the witnesses. The judgment of nonsuit will be upheld.

Affirmed.

W. R. KEEN v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 19 September, 1928.)

APPEAL by plaintiff from *Nunn, J.,* at April Term, 1928, of JOHNSTON. Affirmed.

Edward F. Ward and Wellons & Wellons for plaintiff.
Abell & Shepard for defendant.

PER CURIAM. This is an action for actionable negligence brought by plaintiff against defendant for injury to an automobile by defendant's train at Barber Street crossing, in the town of Four Oaks, N. C.

From a perusal of the evidence, we are of the opinion that the judgment of nonsuit in the court below should be sustained.

Affirmed.

MELISSA LEWIS ET AL. v. WILBUR LEWIS.

(Filed 26 September, 1928.)

APPEAL by plaintiffs from *Grady, J.,* at June Term, 1928, of CARTERET.

Proceeding for partition of lands between plaintiffs and defendant, alleged to be tenants in common.

Defendant interposed a plea of sole seizin, whereupon the cause was transferred to the civil issue docket for trial, which resulted in a verdict and judgment for the defendant.

Plaintiffs appeal, assigning error, in that the court instructed the jury to return a verdict for the defendant if they found the facts to be as testified to by all the witnesses; otherwise their verdict should be for the plaintiffs.

Moore & Dunn and D. H. Willis for plaintiffs.
Guion & Guion for defendant.

PER CURIAM. As all the evidence of any probative value, adduced on the hearing, tends to support the defendant's plea of sole seizin, with none to defeat it, we cannot say there was error in the peremptory instruction of which the plaintiffs complain. See *Lewis v. Lewis,* this same case, reported in 194 N. C., 406, 139 S. E., 772.

No error.

R. C. CANNON & SONS v. D. F. BOWEN.

(Filed 26 September, 1928.)

APPEAL by defendant from *Daniels, J.,* at February Term, 1928, of GREENE. No error.

J. Paul Frizzelle for plaintiffs.
P. R. Hines for defendant.

PER CURIAM. The plaintiffs alleged that the defendant was indebted to them in the sum of $599.58 with interest. The defendant admitted that he had become responsible to the plaintiffs for advancements made on merchandise sold his tenants to the amount of $630 and on his personal account to the amount of $31.30; but he alleged that this amount ($661.30) had been paid. The plaintiffs claimed that the defendant's entire indebtedness had been $1,260.88, but that it has been reduced by this payment to $599.58. The controversy involved an issue of fact, which, under correct instructions, was answered by the jury in favor of the plaintiffs. We find

No error.

STATE v. JAMES PALMER.

(Filed 26 September, 1928.)

APPEAL by defendant from *Nunn, J.,* at May Term, 1928, of LEE. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.
Hoyle & Hoyle for defendant.

PER CURIAM. The defendant was indicted upon three counts for the manufacture of spirituous liquor, for having in his possession property designed for use in such manufacture, and for maintaining a place where intoxicating liquor was stored for barter, sale, or exchange. The verdict was "Guilty as charged." From the sentence pronounced the defendant appealed. Upon inspection of the record and consideration of all the defendant's exceptions we are of opinion that no reversible error has been shown.

No error.

EDWIN TRIPP AND ANNIE TRIPP v. L. F. WORTHINGTON.

(Filed 26 September, 1928.)

APPEAL by defendant from *Nunn, J.,* at August Term, 1928, of PITT. No error.

J. C. Lanier for plaintiff.
S. O. Worthington and S. J. Everett for defendant.

PER CURIAM. This is an action for ejectment instituted by plaintiffs against defendant. The plaintiffs allege that the defendant has wrongfully, unlawfully, and wilfully and without any right, title or interest thereto, entered upon and taken possession of a part of a tract of land owned by plaintiffs. The land in controversy is about an acre and defendant's, L. F. Worthington's, entry thereon is wrongful, unlawful, illegal and contrary to law.

The defendant in answer denies the allegations of plaintiffs. The defendant also sets up adverse possession. The following issue and the answer thereto was submitted to the jury:

1. What is the true dividing line between the lands of the plaintiffs and the defendant? A. From A to B.

The answer to the issue sustained plaintiff's contention.

The plaintiffs and defendant agreed that there was only the one issue—the true dividing line between them. This was a question of fact. The probative force of the evidence was for the jury to determine. We can discover no error in law.

No error.

JULIAN B. WARREN AND WIFE, CHRISTINE S. WARREN, v. HENRY C. BOURNE, TRUSTEE, AND FIRST NATIONAL BANK OF TARBORO.

(Filed 3 October, 1928.)

APPEAL by defendants from *Nunn, J.,* at July Term, 1928, of PITT. Affirmed.

Blount & James for plaintiffs.
Henry C. Bourne for defendants.

PER CURIAM. The court below rendered the following order: "This cause coming on to be heard and being heard before the undersigned judge upon the complaint, answer and other affidavits, it is considered by the court and it is, therefore, ordered and adjudged, and the court finds as a fact that a serious controversy exists that the restraining order heretofore issued be, and the same hereby is continued until the final hearing upon the plaintiffs giving a bond in the sum of $500 to be conditioned according to law and approved by the clerk of the Superior Court of Pitt County. By consent, it is adjudged that the plaintiffs be and they hereby are restrained from encumbering the property described in the deed of trust mentioned in the complaint by mortgage, deed of trust or otherwise pending the final determination of this cause."

In the record, as to material facts, there is serious conflict. We see no reason to disturb the order. *Cobb v. Clegg,* 137 N. C., 153; *Herwitz v. Sand Co.,* 189 N. C., 1; *Wentz v. Land Co.,* 193 N. C., 32; *Brown v. Aydlett,* 193 N. C., 832; *R. R. v. Rapid Transit Co.,* 195 N. C., 305.

Affirmed.

DAN BYRD v. HENRY MONDS AND GEORGE F. POPE.

(Filed 3 October, 1928.)

CIVIL ACTION, before *Nunn, J.,* at April Term, 1928, of HARNETT.

The evidence of plaintiff tended to show that he was the owner of a young horse about four and a half years old; that the horse was untrained and unbroken, and that he made an agreement with the defendant Monds at the defendant Pope's stable to the effect that Monds was to take the horse, care for him properly, and train him to work on the farm with the express understanding that the horse was to be used for farm work only. The evidence further tended to show that on Monday, the 15th day of June, 1925, the horse was taken to the woods and put to work hauling logs. A mule was hitched with the horse to the log wagon. After working the horse in the woods for about a day and a half the horse became sluggish and was found dead in the lot the next morning. The logging operations were carried on by the defendant Pope. Plaintiff alleged that the defendant negligently killed his horse by putting it to work, hauling logs in the woods when at the time the horse was fat, unbroken and untrained for such work.

The defendants alleged and offered evidence tending to show that the work the horse was doing was lighter than farm work, and that the horse was handled with proper care.

Issues of negligence were answered by the jury in favor of plaintiff. From judgment upon the verdict the defendant, Pope, appealed.

Jesse F. Wilson and Godwin & Guy for plaintiff.
J. C. Clifford for defendant, G. F. Pope.

PER CURIAM. The chief question presented by the record is whether or not there was sufficient evidence of negligence on the part of the defendant Pope to be submitted to the jury.

The plaintiff testified that the defendant Pope said, "that the horse was getting so fat that he could not plow it in corn, because he walked too fast, and that he thought he would carry the horse to the log woods and work the horse down a little, and then put the horse back in the plow." The defendant denied making such statement to the plaintiff. Thus an issue of fact was sharply drawn, and it was the province of the jury to determine the truth of the matter. If believed by the jury, the alleged statement of the defendant, was sufficient evidence of the fact that the horse was worked in the logging operations of the defendant with his knowledge and consent if not by his express direction. Hence the defendant would be liable for any negligence in working the horse in his business operations.

The verdict of the jury, therefore, was supported by evidence, and no error of law appears upon the face of the record warranting a new trial.

No error.

ANNIE PITTMAN v. FRANK BELL ET AL.

(Filed 3 October, 1928.)

APPEAL by plaintiff from *Grady, J.*, at May Term, 1928, of PITT. No error.

The verdict was as follows:

1. Were the words "without recourse" stricken from the note sued on without the knowledge and consent of Mrs. M. S. Everett? Answer: Yes.

2. Did S. J. Everett endorse said notes solely for the accommodation of Mrs. Pittman, and in order to enable her to borrow money on said notes? Answer: ....

3. Did the plaintiff notify S. J. Everett that said note had been dishonored after maturity? Answer. No.

Blount & James for plaintiff.
Albion Dunn for S. J. and M. S. Everett.

PER CURIAM. On 1 November, 1923, Frank Bell and Lula Bell executed and delivered to M. S. Everett a promissory note for $600 payable on or before 1 November, 1925. The note before its maturity was endorsed by M. S. Everett to the plaintiff without recourse. S. J. Everett also endorsed it without recourse, but afterwards at the suggestion of Mrs. Pittman or her attorney, and without the consent of M. S. Everett, he struck out the words "without recourse." He contended that he was only an accommodation endorser, that he had received nothing of value by reason of his endorsement, and that no notice of nonpayment had ever been given him. We find no error in the charge of the court, and we are of opinion that upon the verdict as returned the plaintiff was not entitled to judgment against the appellants.

No error.

J. H. CLARK, J. F. McARTHUR AND J. D. McARTHUR v. ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION.

(Filed 10 October, 1928.)

APPEAL by defendant from *Cranmer, J.*, at February Term, 1928, of LENOIR. No error.

Shaw & Jones and Sutton & Greene for plaintiffs.
Rouse & Rouse for defendant.

PER CURIAM. This action was before this Court at Fall Term, 1926, when a new trial was granted on defendant's appeal. *Clark v. R. R.*, 192 N. C., 280. It was said in that action, at page 284, speaking in reference to the agreement set up by defendant in bar of recovery. "The proviso requires the ditches now in use to be kept open as agreed upon on the right of way. Defendant pleads the paper-writing as a defense and relies on it, and claims the benefit under it, and consequently must be responsible for the burdens and keep the ditches on the right of way open as agreed upon. Plaintiffs have a right of action under this particular proviso. Under our liberal practice, we think the allegations in the complaint sufficient, and that the issue should be limited to this view of the case."

The issues submitted to the jury in the present action and their answers thereto were as follows.

"1. Was the plaintiffs' land injured by the failure of the defendant to keep open the ditches in use on said land on 24 March, 1903, as required in the agreement dated 24 March, 1903? Answer: Yes.

"2. What damages, if any, are plaintiffs entitled to recover for the three years prior to 23 June, 1924? Answer: $2,000."

We think the careful judge in the court below tried the case in accordance with the opinion of this Court on the former appeal. The facts were found by the jury in favor of the plaintiffs. There was evidence sufficient to be submitted to them and the probative force was for them. In law we find

No error.

J. F. SUMMERSETTE ET AL. v. WALTER M. STANALAND.

(Filed 17 October, 1928.)

APPEAL by plaintiffs from *Sinclair, J.,* at June Term, 1928, of BRUNSWICK. Affirmed.

Robert W. Davis for plaintiffs.
C. Ed. Taylor and A. M. Rice for defendant.

PER CURIAM. The plaintiffs brought suit to enjoin the defendant from erecting any building on his lands which would be an obstruction to a certain public road. A temporary restraining order was issued and dissolved by the presiding judge at the hearing after considering numerous affidavits filed on behalf of all parties. It will be noted that the action was not dismissed and the matters in controversy were left open for final determination by the orderly course of procedure. Finding no error, we affirm the judgment.

Affirmed.

LONNIE BLIZZARD v. W. C. MOORE AND R. J. DAWSON.

(Filed 17 October, 1928.)

CIVIL ACTION, tried before *Cranmer, J.,* and a jury, at February Term, 1928, of LENOIR.

The plaintiff sued the defendant for the value of certain sand purchased by the defendants. The defendants denied that they had purchased sand, but alleged that a verbal contract existed between them and the plaintiff for the purchase of land, including a sand-pit owned by the plaintiff, and that the sand used by them was to be credited on the purchase price.

The jury answered the issue in favor of the plaintiff, and from judgment upon the verdict defendants appealed.

Cowper, Whitaker & Allen for plaintiff.
F. E. Wallace and Shaw & Jones for defendants.

PER CURIAM. There was a conflict between the evidence offered by plaintiff and that offered by defendants with respect to the contract entered into between the parties. The judge's charge is not contained in the record, and it is therefore to be assumed that he correctly instructed the jury upon every phase of the case. An issue of fact was thus drawn for the determination of the jury, and the verdict therefore determines the merits of the case.

No error.

DURHAM CITIZENS HOTEL CORPORATION v. W. W. DRAKEFORD.

(Filed 24 October, 1928.)

(For digest on see *Hotel Corporation v. Dennis*, 195 N. C., p. 420.)

APPEAL by defendant from judgment of Superior Court of DURHAM, March Term, 1928. No error.

Action upon note, executed by defendant and payable to order of plaintiff for $600. Two payments, aggregating $120, were made by defendant and duly credited on said note.

The action was tried at November Term, 1927, before *Barnhill, J.*, and a jury. By consent, motions with respect to the verdict then returned by the jury, were continued to be heard and passed upon at a subsequent term of the court.

At March Term, 1928, defendant's motion that the verdict returned at November Term, 1927, be set aside, was denied by *Bond, J.*

From judgment on the verdict set out in the record, upon motion of plaintiff, defendant appealed to the Supreme Court.

J. L. Morehead and W. H. Murdock for plaintiff.
J. Grover Lee and R. O. Everett for defendant.

PER CURIAM. We find no error in the trial of the issues submitted to the jury in this case. These issues arise upon the pleadings. There was no evidence tending to sustain the defenses relied upon by defendant. The issues tendered by defendant involving these defenses were properly refused. The court heard the evidence which defendant proposed to offer, in the absence of the jury, and correctly ruled that this evidence did not tend to support the affirmative of the issues tendered.

In his answer, defendant denied that he executed the note sued on; however, in his testimony as a witness in his own behalf, he admitted that he did execute the note, and that he had made two payments thereon. There was no evidence tending to show that the citizen of Durham, who solicited defendant to subscribe for stock in plaintiff corporation, and to execute his note in payment of said stock, received any commission for the sale of the stock to plaintiff or to any one else. The organization of plaintiff corporation was a community enterprise; those who undertook the promotion of such enterprise did so because of their civic pride and public spirit. There was affirmative evidence to this effect which was not contradicted.

Upon the facts of this case we do not think the remark of the judge, in his charge to the jury, was prejudicial to defendant. This remark was an obvious truth both as a proposition of law and as a principle of morality. Defendant's assignment of error, based upon exceptions to this remark, cannot be sustained.

The judgment is affirmed upon the authority of *Hotel Corporation v. Dennis,* 195 N. C., 420, 142 S. E., 578.

No error.

DAVID U. LAW v. SANFORD F. JOHNSON.

(Filed 7 November, 1928.)

APPEAL by defendant from *MacRae, Special Judge,* at May Term, 1928, of FORSYTH. No error.

J. E. Alexander and L. M. Butler for plaintiff.
Fred M. Parrish and R. L. Deal for defendant.

PER CURIAM. This is an action for the recovery of damages growing out of a collision of automobiles alleged to have been caused by the negligence of the defendant. The issues of negligence, contributory negligence and damages were answered in favor of the plaintiff, and from the judgment pronounced the defendant appealed, assigning error.

We have examined the appellant's exceptions and have discovered no error which entitles him to a new trial. The questions of law have been frequently considered and require no additional discussion.

No error.

D. J. LAMB v. J. W. BOYLES.

(Filed 7 November, 1928.)

APPEAL by plaintiff from *Stack, J.*, at May Term, 1928, of DAVIDSON. Affirmed.

Walser & Walser and Phillips & Bower for plaintiff.
Raper & Raper and H. R. Kyser for defendant.

PER CURIAM. Pursuant to the decision in the former appeal the action was dismissed. *Lamb v. Boyles,* 192 N. C., 542. The plaintiff again brought suit and again there was a judgment of nonsuit. In all essential features the evidence in the two cases is substantially the same. The judgment is affirmed in accordance with the opinion cited above and with *Perry v. Bottling Co., ante,* 175.

Affirmed.

WALTER F. MAHAFFEY v. FORSYTH FURNITURE LINES, INC.

(Filed 7 November, 1928.)

APPEAL by defendant from *MacRae, Special Judge,* at May Term, 1928, of FORSYTH. Affirmed.

Briefly: The plaintiff contended that defendant's foreman ordered him to get out some chair-arm samples, and they were in a hurry for them. The shaper machine on which he was to do the work had a flat, smooth bed made of iron. The knives came up through the bed, or table, 10 to 12 inches. The drive shaft and knives are driven by an electric motor. The revolutions of the machine are about 4,500 per minute. There is no guard on the machine and the knives are open and exposed. That guards on the shaper machine in question are approved and in general use in plants and places of like kind and character. Guards are made and sold by the same manufacturer of the shaper machines. That about a month before the injury complained of, the foreman's attention was called to the matter. Plaintiff testified: "I asked him if he didn't think we ought to have guards on the machines—shapers. He said 'Yes, we need them on there.' He said 'We will see what we can do about it.'" To operate the machine you push the material against the knives. That the gum wood he was using in making the chair-arm samples was warped a little bit and in shaping the arms it kicked back and threw his hand into the knife, cutting his fingers off.

The defendant contended that plaintiff was an experienced workman. That the work was entrusted to him to do in accordance with his knowledge, skill, experience and judgment. He was head shaperman. As head shaper his duties were to set up machines and see that proper set-up was made. That it was incumbent upon him to make the usual and customary form, well known to him, that was the safe and proper way to do the work. The form is used and answers as a guard. That he negligently and carelessly entered upon the work without making and using the form, and this was the proximate cause of the injury, and defendant sets up the plea of contributory negligence in bar of recovery.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"2. If so, did the plaintiff contribute to his own injury, as alleged in the answer? Answer: No.

"3. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: $4,000."

Archie Elledge for plaintiff.
Manly, Hendren & Womble for defendant.

PER CURIAM. This is a civil action for actionable negligence, tried before the judge and a jury, in the Forsyth County Court. All the issues were found in favor of the plaintiff. Defendant assigned numerous errors and appealed to the Superior Court. The court below was of the opinion that they were "without merit, and that there was no error committed in the admission or the exclusion of testimony, or in the charge of the court as set forth in said assignments, and all of said exceptions are therefore overruled." In this we think there was no error.

From the judgment of the Superior Court the defendant appealed to this Court, assigning the same errors.

It will be noted that the jury accepted plaintiff's version of the matter. From a careful perusal of the record, we can find no prejudicial or reversible error. The judge of the Forsyth County Court tried the case with care. The contentions on both sides were clearly and fairly given. The law applicable to the facts on every phase of the case was expounded to the jury. The principles involved in this case are well settled in this jurisdiction. See *Boswell v. Hosiery Mills,* 191 N. C., p. 549; *Maulden v. Chair Co., ante,* 122; *Street v. Coal Co., ante,* 178. The judgment below is

Affirmed.

D. J. LAMB v. J. W. BOYLES.

(Filed 7 November, 1928.)

APPEAL by plaintiff from *Stack, J.*, at May Term, 1928, of DAVIDSON. Affirmed.

Walser & Walser and Phillips & Bower for plaintiff.
Raper & Raper and H. R. Kyser for defendant.

PER CURIAM. Pursuant to the decision in the former appeal the action was dismissed. *Lamb v. Boyles,* 192 N. C., 542. The plaintiff again brought suit and again there was a judgment of nonsuit. In all essential features the evidence in the two cases is substantially the same. The judgment is affirmed in accordance with the opinion cited above and with *Perry v. Bottling Co., ante,* 175.

Affirmed.

WALTER F. MAHAFFEY v. FORSYTH FURNITURE LINES, INC.

(Filed 7 November, 1928.)

APPEAL by defendant from *MacRae, Special Judge,* at May Term, 1928, of FORSYTH. Affirmed.

Briefly: The plaintiff contended that defendant's foreman ordered him to get out some chair-arm samples, and they were in a hurry for them. The shaper machine on which he was to do the work had a flat, smooth bed made of iron. The knives came up through the bed, or table, 10 to 12 inches. The drive shaft and knives are driven by an electric motor. The revolutions of the machine are about 4,500 per minute. There is no guard on the machine and the knives are open and exposed. That guards on the shaper machine in question are approved and in general use in plants and places of like kind and character. Guards are made and sold by the same manufacturer of the shaper machines. That about a month before the injury complained of, the foreman's attention was called to the matter. Plaintiff testified: "I asked him if he didn't think we ought to have guards on the machines—shapers. He said 'Yes, we need them on there.' He said 'We will see what we can do about it.'" To operate the machine you push the material against the knives. That the gum wood he was using in making the chair-arm samples was warped a little bit and in shaping the arms it kicked back and threw his hand into the knife, cutting his fingers off.

The defendant contended that plaintiff was an experienced workman. That the work was entrusted to him to do in accordance with his knowledge, skill, experience and judgment. He was head shaperman. As head shaper his duties were to set up machines and see that proper set-up was made. That it was incumbent upon him to make the usual and customary form, well known to him, that was the safe and proper way to do the work. The form is used and answers as a guard. That he negligently and carelessly entered upon the work without making and using the form, and this was the proximate cause of the injury, and defendant sets up the plea of contributory negligence in bar of recovery.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"2. If so, did the plaintiff contribute to his own injury, as alleged in the answer? Answer: No.

"3. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: $4,000."

Archie Elledge for plaintiff.
Manly, Hendren & Womble for defendant.

PER CURIAM. This is a civil action for actionable negligence, tried before the judge and a jury, in the Forsyth County Court. All the issues were found in favor of the plaintiff. Defendant assigned numerous errors and appealed to the Superior Court. The court below was of the opinion that they were "without merit, and that there was no error committed in the admission or the exclusion of testimony, or in the charge of the court as set forth in said assignments, and all of said exceptions are therefore overruled." In this we think there was no error.

From the judgment of the Superior Court the defendant appealed to this Court, assigning the same errors.

It will be noted that the jury accepted plaintiff's version of the matter. From a careful perusal of the record, we can find no prejudicial or reversible error. The judge of the Forsyth County Court tried the case with care. The contentions on both sides were clearly and fairly given. The law applicable to the facts on every phase of the case was expounded to the jury. The principles involved in this case are well settled in this jurisdiction. See *Boswell v. Hosiery Mills,* 191 N. C., p. 549; *Maulden v. Chair Co., ante,* 122; *Street v. Coal Co., ante,* 178. The judgment below is

Affirmed.

its contract, whereby the plaintiff had been damaged in the sum of six hundred and thirty dollars. Judgment was given in favor of the plaintiff and the defendant appealed, assigning error.

After an examination of the record and a consideration of the exceptions, we find no error which entitles the defendant to a new trial.

No error.

D. F. FRAZIER ET AL., TRUSTEES OF EMANUEL CONGREGATIONAL CHURCH, v. JAMES H. YOUNG.

(Filed 28 November, 1928.)

APPEAL by defendant from *Harding, J.,* at March Term, 1928, of MECKLENBURG. No error.

J. D. McCall and C. H. Edwards for plaintiff.
H. L. Taylor for defendant.

PER CURIAM. This is an action for the recovery of a lot in the city of Charlotte, the boundaries of which are set out in the complaint. The defendant filed an answer denying the plaintiffs' allegations and pleading adverse possession for twenty years and for seven years under color of title. The jury returned a verdict to the effect that the plaintiffs are the owners of the land described in the third and fourth paragraphs of the complaint, and that the defendant has not had such adverse possession as would defeat the plaintiff's title. Judgment was rendered for the plaintiffs and the defendant excepted and appealed.

We have given to each of the exceptions a careful investigation and are of opinion that they present no sufficient ground for a new trial.

No error.

J. W. SILVERS v. J. B. NOLAN & COMPANY.

(Filed 5 December, 1928.)

APPEAL by plaintiff from *MacRae, Special Judge,* at July Term, 1928, of CLEVELAND. No error.

Action to recover damages for false and fraudulent representations as to the solvency of the maker of certain negotiable notes. The said notes were endorsed by defendant, payee therein, "without recourse," and negotiated, for value to plaintiff. They were not paid at maturity. The maker has been adjudged a bankrupt by the United States District Court for the Western District of South Carolina.

Plaintiff alleges in this complaint that at the time of the negotiation of said notes defendant represented that the notes were good; that the maker was solvent, and was able to pay and would pay the notes at maturity; that these representations were false and fraudulent, and that he was thereby damaged.

From judgment on an adverse verdict, plaintiff appealed to the Supreme Court.

Bennett & Edwards for plaintiff.
Newton & Newton for defendant.

PER CURIAM. Under instructions free from error, the jury has found that the essential allegations of the complaint are not sustained by the evidence. The assignments of error relied upon by plaintiff on his appeal to this Court cannot be sustained. The evidence objected to by plaintiff was not material; the principle of law relied upon to sustain the objection has no application. The only exception to the charge as given was directed to a statement by the court of the contention of defendant, and is supported by the evidence. The instructions were clear and full, in compliance with C. S., 564. The judgment is affirmed. There is

No error.

JOHN M. TARRH v. SOUTHERN RAILWAY COMPANY AND S. W. SIMERSON.

(Filed 5 December, 1928.)

APPEAL by Southern Railway Company from an order of *Oglesby, J.*, overruling its demurrer to the complaint. From ROWAN. Affirmed.

C. L. Coggin and John C. Busby for plaintiff.
Linn & Linn for Southern Railway Company.

PER CURIAM. The Southern Railway Company demurred to the complaint on the ground of a misjoinder of parties and causes of action. The demurrer was overruled and the Railway Company appealed. We have given careful attention to the record and the brief filed by the learned counsel for the appellant, but we find no sufficient cause for reversing the judgment.

Affirmed.

B. S. LAWRENCE v. C. C. CHEEK ET AL.

(Filed 5 December, 1928.)

APPEAL by defendants from *Townsend, Special Judge,* at March Term, 1928, of RANDOLPH.

Civil action for damages to plaintiff's property, resulting from deterioration while in defendants' possession, a replevy bond having been given to hold same.

Verdict and judgment for plaintiff, from which defendants appeal, assigning errors.

J. A. Spence and H. M. Robins for plaintiff.
C. N. Cox and Brittain, Brittain & Brittain for defendants.

PER CURIAM. The exceptive assignments of error, upon which appellants rely, relate to the admission and exclusion of evidence. The charge is not in the record, and the exceptions addressed to the refusal of the court to grant the defendants' motion for judgment as of nonsuit, made first at the close of plaintiff's evidence and renewed at the close of all the evidence, have been abandoned.

We find no error on the record which entitles the defendants to a new trial. The verdict and judgment will be upheld.

No error.

F. BATE BLANTON v. CHARLEY BRIDGES.

(Filed 12 December, 1928.)

APPEAL by plaintiff from *MacRae, Special Judge,* at August Term, 1928, of CLEVELAND.

Civil action to recover damages for an alleged negligent killing of plaintiff's dog.

The evidence tends to show that "Lucy was a sweet-voiced fox hound, with an unerring scent and vibrant tongue, that always gave full mouth to the chase. She was a good, regular runner, and kept track all the time and gave plenty of mouth and got up in front with the good dogs." The defendant ran over her with his automobile and killed her, as she was crossing the road in front of plaintiff's house.

The appeal is from a judgment of nonsuit, entered at the close of plaintiff's evidence.

B. T. Falls for plaintiff.
Newton & Newton for defendant.

PER CURIAM. The plaintiff, a fox-hunter fond of the chase, brings this action to recover for the loss of Lucy, one of his "good dogs." He alleges that she was killed and sent prematurely to her "happy hunting ground" by the negligence of the defendant, but we are unable to discover on the record any evidence of sufficient probative value to fix the defendant with liability. Negligence is not presumed from the mere fact of killing, under the circumstances here disclosed.

Affirmed.

ABRAHAM YOUNG v. JOHN HEDDEN.

(Filed 19 December, 1928.)

APPEAL by plaintiff from *MacRae, Special Judge,* at Spring Term, 1928, of MACON. Affirmed.

J. F. Ray and R. D. Sisk for plaintiff.
Geo. B. Patton and Jones & Jones for defendant.

PER CURIAM. The plaintiff instituted this action to recover damages for the alleged negligence of the defendant in setting out fire and burning the plaintiff's timber and grass. At the conclusion of all the evidence the defendant's motion for nonsuit was allowed. The plaintiff excepted and appealed. We find no error in this ruling and affirm the judgment.

Affirmed.

G. W. WALTERS v. PHŒNIX UTILITY COMPANY ET AL.

(Filed 19 December, 1928.)

APPEAL by defendants, Phœnix Utility Company and H. L. Lincoln, from order of *Harwood, Special Judge,* at September Term, 1928, of HAYWOOD. Affirmed.

The above-entitled cause was heard upon defendants' appeal from an order of the clerk, denying defendants' motion for the removal of the action from the Superior Court of Haywood County to the United States District Court for the Western District of North Carolina for trial.

The petition upon which the motion was made was duly filed in accordance with statutory provisions. The grounds stated therein for the removal are (1) separability of the cause of action alleged in the complaint; (2) fraudulent joinder of resident defendant, for the purpose of preventing, prima facie, the order of removal.

From the order of the judge affirming the order of the clerk, and denying their motion, defendants appealed to the Supreme Court.

Morgan & Ward and M. G. Stamey for plaintiff.
Harkins & Van Winkle for defendants.

PER CURIAM. The order of the judge affirming the order of the clerk, and denying the motion of the nonresident defendants for the removal of this action from the State Court to the Federal Court for trial, upon the grounds stated in the petition, is affirmed upon the authority of *Givens v. Mfg. Co., ante,* 377; *Crisp v. Fibre Co.,* 193 N. C., 77, 136 S. E., 238; *Fenner v. Cedar Works,* 191 N. C., 207, 131 S. E., 625. The principles controlling the decision of the question presented by this appeal are well settled in the above-cited cases. It is unnecessary to cite other cases in this or other jurisdictions; nor is it deemed necessary to restate these principles. There is no error, and the order is

Affirmed.

BESSIE WILLIS YOUNG v. KATHERINE E. HAMILTON.

(Filed 19 December, 1928.)

APPEAL by defendant from *McElroy, J.,* at September Term, 1928, of BUNCOMBE.

Civil action to recover on two negotiable promissory notes representing the balance due on the purchase of a lot of land located in the city of Asheville.

The defendant admitted the execution of the notes sued on in this action, and pleaded as a defense that she was induced to purchase the lot of land in question by the false and fraudulent representations of plaintiff's agent as to the location of said lot with reference to its proximity to Southside Avenue.

The defendant contends that the plaintiff's agent represented to her daughter that the lot in question was quite valuable for the reason that it was separated from Southside Avenue by a very narrow strip of land, seven or eight feet, and that this small strip of land could not be utilized or used to advantage, except in connection with the lot she was buying, and that the owners of said narrow strip would have to purchase her lot in order to utilize their own property, hence her lot could be sold to them at a profit within thirty days. That as a matter of fact this intervening strip of land is 32.9 feet in width and could readily be used for a store-building, filling station or other purpose.

The trial court ruled that the evidence of fraud was not sufficient to go to the jury, and dismissed the defendant's counterclaim.

From a verdict and judgment for plaintiff the defendant appeals, assigning errors.

A. Hall Johnston and Ward & Allen for plaintiff.
Lee, Ford & Coxe for defendant.

PER CURIAM. Pretermitting the question as to whether the defendant in her counterclaim has alleged facts sufficient to constitute a defense or a cause of action for deceit (*Stone v. Milling Co.,* 192 N. C., 585, 135 S. E., 449), we are of opinion that the evidence offered in support thereof is too vague and indefinite or too gossamery to sustain such an action or to defeat plaintiff's claim.

No error.

P. M. BROWN v. S. W. COTTER.

(Filed 9 January, 1929.)

APPEAL by defendant from *Moore, J.,* at August Term, 1928, of CHEROKEE. No error.

Action to recover damages for trespass upon land by cutting and removing timber trees therefrom.

From judgment for plaintiff, in accordance with the verdict, defendant appealed to the Supreme Court.

M. W. Bell for plaintiff.
Moody & Moody for defendant.

PER CURIAM. Plaintiff and defendant are owners of adjoining tracts of land, situate in Cherokee County, North Carolina.

This action involves title to a parcel of land, containing about twenty-four acres, and grows out of a controversy as to the location of the dividing line between said tracts of land. The determinative questions involve, first, the location of the beginning point called for in the grant and deeds under which plaintiff claims title to the land in dispute; and, second, the possession of said land by defendant and those under whom he claims.

There was evidence in support of the verdict. We find no error in the instructions of the court in the charge to the jury. The assignments of error on defendant's appeal to this Court cannot be sustained. They present no questions which seem to require or justify discussion. The judgment is affirmed. There is

No error.

J. M. SUTTON v. SUNCREST LUMBER COMPANY ET AL.

(Filed 9 January, 1929.)

APPEAL by defendant from *Harwood, Special Judge,* at September Term, 1928, of HAYWOOD.

Civil action to recover damages for an alleged negligent injury sustained by plaintiff while working as a "tong-hooker" at one of the defendant company's steam log-loaders.

It is alleged that plaintiff's injury was due to an overhead cable being stretched too tight, which caused "the shackle-pin" to break and throw the "fall block" or the shackle and cable against plaintiff, injuring his legs and back and fracturing a rib.

Plaintiff testified: "The weight of the overhead cable is on the shackle-pin. If the cable is too tight, it is dangerous. The foreman told the rigger that morning to loosen the cable as it was dangerous. He said it was too tight. But after telling the rigger to loosen the line, the foreman went ahead with the logging with the line in that condition. The block fell 40 or 50 feet, striking me on the back and inflicting serious injury."

Issues of negligence and damages were submitted to the jury and answered in favor of the plaintiff. From the judgment rendered thereon the defendants appeal, assigning as their chief error the refusal of the court to enter judgment as in case of nonsuit.

Morgan & Ward and M. G. Stamey for plaintiff.
Rollins & Smathers for defendants.

PER CURIAM. Even if it be conceded that on the record the jury might well have returned a verdict in favor of the defendants, still the evidence of the plaintiff, taken in its most favorable light, the accepted position on a motion to nonsuit, was such as to require its submission to the twelve.

A careful perusal of the record discloses no material or substantial error. The verdict and judgment will be upheld.

No error.

HORATIO ARRINGTON v. SUNCREST LUMBER COMPANY ET AL.

(Filed 9 January, 1929.)

APPEAL by defendants from *Harwood, Special Judge,* at September Term, 1928, of HAYWOOD.

Civil action to recover damages for an alleged negligent injury sustained by plaintiff while working as a "tong-hooker" at a steam-loader operated by the defendant company, by which logs were lifted from a pile called the "jack pot" and placed on railroad cars for shipment.

The evidence of the plaintiff is to the effect that the engineer in charge of the skidder disobeyed the signal given by plaintiff, and thus caused the log, being lifted, to move in an opposite direction from that expected or anticipated, and caught the plaintiff between two cars, breaking his leg and otherwise injuring and bruising him.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff. From the judgment rendered thereon, the defendants appeal, assigning errors.

Morgan & Ward and M. G. Stamey for plaintiff.
Rollins & Smathers for defendants.

PER CURIAM. The right of the plaintiff to recover for injuries sustained, under circumstances such as those disclosed by the present record, is fully discussed in *Cook v. Mfg. Co.,* 182 N. C., 205, 108 S. E., 730, and 183 N. C., 48, 110 S. E., 608.

The case was properly submitted to the jury, and we have found no error on the record, save a discrepancy between the verdict and the judgment as to the answer of the second issue, but which is not deemed fatal to the validity of the trial.

No error.

W. L. GODWIN v. GRIFFIN-BLAND HOTEL COMPANY.

(Filed 16 January, 1929.)

APPEAL by plaintiff from *Cranmer, J.,* at April Term, 1928, of WAKE.

Civil action to recover damages for an alleged negligent injury to plaintiff's hand caused by an unguarded electrically driven exhaust fan used in the operation of defendant's laundry located in the basement of the Sir Walter Hotel, Raleigh, N. C.

There is evidence tending to show that on 22 April, 1926, the defendant installed an electrically driven exhaust fan in its laundry in the basement of the Sir Walter Hotel for use in eliminating warm or foul air from the laundry room. The fan was 36 inches in diameter, encircled by a metal rim or ring. In the center was another metal rim or disk to which the blades of the fan were attached. As finally installed, the blades were not even with the rim of the circumference, but extended out in front about four inches, which created a deceptive appearance when the fan was running or the blades were in motion. These projecting blades were unprotected, and on the first day after said fan was installed plaintiff's hand was caught in the revolving blades and severely injured.

At the close of plaintiff's evidence, judgment of nonsuit was entered on motion of the defendant, from which the plaintiff appeals, assigning error.

Smith & Joyner for plaintiff.
Ruark & Fletcher for defendant.

PER CURIAM. The judgment of nonsuit was entered on the theory that the plaintiff was guilty of contributory negligence on his own testimony, but viewing the evidence in its most favorable light for the plaintiff, the accepted position on a motion to nonsuit, we think the case should have been submitted to the jury.

It would serve no useful purpose to discuss the evidence, as the only question before us is whether it is sufficient to carry the case to the jury, and we think it is.

Reversed.

STATE v. K. D. GRANT, JR.

(Filed 20 February, 1929.)

APPEAL by defendant from *Harwood, Special Judge,* at August Special Term, 1928, of RICHMOND.

Criminal prosecution, tried upon an indictment charging the defendant with unlawfully possessing and transporting intoxicating liquors.

Verdict: Guilty.

Judgment: Eighteen months on the roads.

Defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.
Willis R. Jones for defendant.

PER CURIAM. A careful perusal of the record leaves us with the impression that no reversible error was committed on the trial. His Honor's statement as to what constitutes an aider and abettor, considered alone, may be subject to some criticism, but taken as a whole we think the charge meets the requirements of the law.

No error.

EFFIE M. WHITEHURST v. T. J. NIXON.

(Filed 20 February, 1929.)

For Digest see *Whitehurst v. Garrett, ante,* 154.

APPEAL by defendant from *Small, J.,* at November Term, 1928, of PASQUOTANK.

Civil action to recover damages for an alleged wrongful conversion and detention of a Pontiac automobile, the property specifically described in plaintiff's chattel mortgage.

From a verdict and judgment in favor of plaintiff, the defendant appeals, assigning errors.

Thompson & Wilson for plaintiff.
Whedbee & Whedbee for defendant.

PER CURIAM. The principal question presented by the appeal is whether one who purchases an automobile from a licensed dealer, generally offering cars for sale to the public, gets title superior to that of a prior mortgagee who holds a valid chattel mortgage, duly registered, on said automobile. This question was answered in the negative in the case of *Whitehurst v. Garrett, ante,* 154, and, on authority of what was said in that case, the judgment in the instant case will be upheld.

No error.

JAMES P. GOOCH v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 27 February, 1929.)

CIVIL ACTION, before *Small, J.,* at October Term, 1928, of BEAUFORT. A judgment of nonsuit was entered and the plaintiff appealed.

Harry McMullan for plaintiff.
McLean & Rodman for defendant.

PER CURIAM. The Court being evenly divided in opinion, *Adams, J.*, not sitting, the judgment of the Superior Court is affirmed and stands as the decision in this case without becoming a precedent. *Hillsboro v. Bank et al.*, 191 N. C., 828, 132 S. E., 657.

Affirmed.

TOWN OF TARBORO v. MRS. KATE I. JOHNSON.

(Filed 27 February, 1929.)

CIVIL ACTION, before *Moore, Special Judge,* at October Term, 1928, of EDGECOMBE.

George M. Fountain for plaintiff.
Gilliam & Bond for defendant.

PER CURIAM. *Connor, J.,* did not sit, and the Court being evenly divided in opinion, the judgment of the Superior Court is affirmed and stands as the decision in this case without becoming a precedent. *Hillsboro v. Bank et al.,* 191 N. C., 828, 132 S. E., 657.

Affirmed.

THOMAS J. POTTER, ADMINISTRATOR OF CORA MAE MITCHELL, v. DIXIE TRANSIT COMPANY, AND JESSE MITCHELL v. DIXIE TRANSIT COMPANY.

(Filed 27 February, 1929.)

APPEALS by defendant from *Lyon, J.,* at November Special Term, 1928, of WAYNE. No error.

On 29 September, 1927, Cora Mae Mitchell was riding in a wagon, with her husband, Jesse Mitchell, on State Highway No. 40. They were returning from Goldsboro to their home in the country.

A bus owned and operated on said highway by defendant overtook said wagon, and struck it in the rear. At the time of the collision the bus was being driven at a rapid rate of speed, and in a negligent manner.

As a result of the collision, Cora Mae Mitchell was thrown from the wagon. She thereby sustained injuries from which she died within a few weeks. Jesse Mitchell also sustained injuries to his person caused by the said collision. His wagon was damaged. He has paid or become liable for large sums for medical services to his wife and to himself and for the funeral expenses of his wife.

Actions by the administrator of Cora Mae Mitchell to recover of defendant damages for her wrongful death, and by Jesse Mitchell to recover of defendant damages for injuries sustained by him, were tried together, by consent. There was a verdict in each of said actions for the plaintiffs and against the defendant.

From judgments on said verdicts defendant appealed to the Supreme Court. By consent, the said appeals were heard together.

W. A. Finch and D. H. Bland for plaintiffs.

Albert L. Cox, Dickinson & Freeman and A. L. Purrington for defendant.

PER CURIAM. Defendant's assignments of error on its appeals to this Court are based on exceptions (1) to the overruling of its objections to evidence offered by plaintiffs at the trial in the Superior Court, and (2) to instructions of the court to the jury in the charge.

There was no error in the admission of the evidence, tending to show the speed at which the bus was being driven before it struck the wagon; or in the instructions upon the issues involving the liability of defendant to the plaintiffs. The assignments of error present no question for decision by this Court, which seem to require discussion. They cannot be sustained. The judgment is affirmed.

No error.

BEN E. EASON v. CAROLINA POWER AND LIGHT COMPANY.

(Filed 6 March, 1929.)

APPEAL by plaintiff from *Barnhill, J.,* at October Term, 1928, of NASH. Affirmed.

J. W. Keel and C. C. Pierce for plaintiff.

Spruill & Spruill for defendant.

PER CURIAM. The plaintiff brought suit to recover damages for personal injury. The defendant demurred to the complaint and the demurrer was sustained at the February Term, 1928. Thereafter plaintiff filed an amended complaint and the defendant again demurred and the demurrer was sustained at the October Term, 1928. We are of opinion that the complaint fails to disclose allegations which are sufficient in law to constitute a valid cause of action against the defendant. The judgment sustaining the demurrer is therefore

Affirmed.

STATE v. MILLIARD JOHNSON.

(Filed 6 March, 1929.)

APPEAL by defendant from *Daniels, J.*, and a jury, at August Term, 1928, of WAYNE. No error.

The defendant was tried and convicted of murder in the second degree for killing Pink Rose. He made numerous exceptions and assignments of error and appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. Faison Thomson, N. W. Outlaw and Dickinson & Freeman for defendant.

PER CURIAM. The exceptions and assignments of error made by defendant in regard to the admission and exclusion of certain evidence and the charge of the court below, we do not think can be sustained. If error, we do not consider them material or prejudicial. The exceptions and assignments of error on the record present no new or novel propositions of law. On the whole record we find

No error.

STATE v. J. L. CRAFT AND J. F. CRAFT.

(Filed 6 March, 1929.)

APPEAL by defendants from *Harwood, Special Judge,* and a jury, at December Special Term, 1928, of PITT. No error.

The defendants were tried on bills of indictment for the larceny of some 700 pounds of tobacco, valued at $203, taken from the packhouses of W. H. Oakley and Frank Carmon, on 9 October, 1928, and receiving said tobacco knowing same to have been stolen. By consent the defendants were tried together and the jury returned a verdict of guilty against both of the defendants for larceny. From the judgment pronounced upon the verdict, defendants appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

L. W. Gaylord for defendants.

PER CURIAM. At the close of the State's evidence and at the close of all the evidence, both the defendants made motions for judgment of nonsuit. C. S., 4643. The defendant, J. F. Craft, did not offer any evidence. The defendants' exceptions and assignments of error present the sole question as to whether or not on all the evidence it was sufficient to be submitted to a jury. We think so.

The evidence was circumstantial, but sufficient to have been submitted to the jury; the probative force was for them to determine. *S. v. Lawrence, ante,* 562. We find in law

No error.

BURKE HEAD v. SEVEN SPRINGS SUPPLY COMPANY.

(Filed 6 March, 1929.)

APPEAL by defendant from *Daniels, J.,* at October Term, 1928, of WAYNE. No error.

D. C. Humphrey, Kenneth C. Royall and J. Q. LeGrand for plaintiff.
J. Faison Thomson for defendant.

PER CURIAM. On 15 November, 1923, the defendant obtained a judgment by default against the plaintiff for the sum of $1,041, with interest from 6 December, 1922, at the rate of 6% until paid. The plaintiff alleged that on 15 October, 1925, the plaintiff paid the defendant $100 upon a mutual agreement that the payment was to be accepted in full payment of all interest on the judgment; that the defendant thereafter repudiated its agreement and asserted an alleged right to collect all the interest called for in the original judgment; that the plaintiff then tendered the defendant $954.95 as the principal and costs of the judgment, and that the defendant refused to accept the tender. The defendant denied the material allegations of the complaint. The following verdict was returned:

1. Did the plaintiff and defendant enter into an agreement of 15 October, 1925, to the effect that if the plaintiff should pay upon the judgment offered in evidence the sum of $100, that the defendant would relieve the plaintiff from the payment of all interest upon the said judgment, as alleged in the complaint? Answer: Yes.

It was thereupon adjudged that no interest should be charged or collected on the judgment. The defendant excepted and appealed.

We have examined the appellant's assignments of error and are of opinion that the case was tried in substantial compliance with the law.

No error.

APPENDIX

IN THE MATTER OF ADVISORY OPINIONS

On 29 January, 1929, the following resolution was received from the North Carolina Senate:

RESOLUTION OF THE SENATE OF NORTH CAROLINA, RESPECTFULLY REQUESTING THE ADVICE OF THE SUPREME COURT OF NORTH CAROLINA.

WHEREAS certain bills are now pending in the Senate of North Carolina, one being Senate Bill No. 143 and the other being Senate Bill No. 144, introduced by Clark, of Mecklenburg; and,

WHEREAS said bills affect the Judicial system of the State and the Senate is desirous of being informed of the constitutionality of said proposed measures before acting upon same; and,

WHEREAS no change should be made in the system of Superior Courts of North Carolina unless such change is constitutional:

NOW, THEREFORE, Be it resolved by the Senate of North Carolina:

SECTION 1. That copies of the said two bills be sent to the Supreme Court of North Carolina, and that said Court be respectfully requested to inspect said bills and advise the Senate, or the Committee on Courts and Judicial Districts, whether in the opinion of the Court, said bills are in contravention of the Constitution of North Carolina.

SECTION 2. That the President of the Senate is requested to send this resolution with copy of said bills to the Supreme Court promptly.

To this the following response was made 5 February, 1929:

RALEIGH, N. C., 5 February, 1929.

To the HONORABLE R. T. FOUNTAIN, *Lieutenant-Governor,*
ex officio President of the Senate, and
Members of the North Carolina Senate:

The resolution of your Honorable Body, respectfully requesting the advice of the Supreme Court as to the constitutionality of Senate Bill No. 143, entitled "An Act to Provide Two Superior Court Judges for the Fourteenth Judicial District," and Senate Bill 144, entitled "An Act to Make Mecklenburg County a Judicial District," was received last week soon after the adjournment of the Fall Term, 1928, and while the members of the Court were engaged in the examination of applicants for license to practice law. The Court has since reconvened for the Spring Term, 1929, and said resolution has been duly considered.

It has long been a mooted question, and one not easy of decision, as to whether the Constitution of 1868 does, or does not, prohibit the Supreme Court from giving advisory opinions. When the matter first arose in 1870 (see *Opinions of the Justices,* 64 N. C., 785, for arguments *pro* and *con), Justices Reade* and *Settle* took the position that it does, while *Chief Justice Pearson* and *Justices Rodman* and *Dick* were of the opinion that the members of the Court, as Justices, but not as a Court, might give such opinions to the General Assembly simply as a matter of courtesy, and out of respect, to a coördinate branch of the government. The present resolution, it will be observed, is addressed to the Court in its official capacity.

We find that, on other occasions, opinions have been given to the legislative department on constitutional questions, affecting the structure of the government and matters of grave public moment, when it appeared, with reasonable certainty, that a course of action had been agreed upon by the General Assembly and it thereupon desired to know whether the policy, about to be adopted, was permissible under the organic law. This is as far as our predecessors have gone, and we do not feel at liberty to extend the precedents established by them, in the absence of a more urgent showing.

From an examination of the bills accompanying the resolution, it appears that the two are sufficiently different in principle to render the adoption of both perhaps doubtful or unnecessary, and that the General Assembly has not yet agreed upon which, if either, it is likely to approve. A similar situation arose with the General Assembly of 1925, but was not the subject of formal response, as the resolution of that session was later withdrawn.

In view of the foregoing premises, we are constrained to ask the privilege of returning said bills without determining their constitutionality, not from any desire to avoid expressing an opinion, but for the reasons herein given. Should the matter finally come within the limits above stated, the members of the Court would not then hesitate to express their opinions.

Respectfully submitted by direction of the Supreme Court.

W. P. STACY,
Chief Justice.

ADDRESS

BY JOSEPHUS DANIELS

ON

PRESENTATION OF THE PORTRAIT

OF

HON. HENRY GROVES CONNOR

TO THE

SUPREME COURT OF NORTH CAROLINA

BY HIS CHILDREN

ON TUESDAY, 19 FEBRUARY, 1929

I cannot remember when I did not know Henry Groves Connor. Our friendship had no birth. It was inherited. Our mothers, widows and neighbors in the village of Wilson, were pillars of goodness and usefulness. They had learned and practiced "the luxury of doing good." They were united by community service and common faith. They illustrated Bacon's "there was never law, or sect, or opinion, did so much magnify goodness as the Christian religion doth." Their close friendship, I am happy to recall, became a heritage of their children. It is the highest title of nobility to be born of such mothers. Perhaps it was their similarity of experience that knit these mothers together, for early widowed, their purpose in life, about which they often communed, was to rear their children to be worthy of the sterling character of their fathers.

There was never a time when I did not regard Henry Groves Connor as having about him a certain high quality that gave assurance of a distinguished future. Ten years my senior, he was a practising lawyer before I began to parse Latin sentences. There is a wide gulf between a boy of ten and a man of twenty. That chasm was bridged in our experience when boyish admiration ripened into intimacy and affection, and the younger looked to the older for counsel and found him an inspiring exemplar. Growing up with a feeling that he was marked for high place, I later came to understand the source of his distinction. As a youth he bore himself in such way as to impress the community that he lived in two worlds, as indeed he always did. One was the work-a-day world about him wherein he accomplished his task as a true yokefellow with his associates. In that other world in which he walked, he communed with the master minds of all ages and climes. The world of reading set him apart in an indefinable way from most of his associates. If "set apart," however, it was only in the respect which superior ability is sure to command. He was not "set apart" otherwise, for he held the regard and esteem of the people of every walk of life. It would convey a wholly wrong impression of the man, indeed, to infer that his reserve and aloofness indicated lack of warmth in his friendships, interest in his associates, or want of a certain humor and raillery which gave him rare charm. Indeed his philosophy, while grave, was shot through with the human touch. He possessed a gaiety, cheerfulness, and love of the lighter vein which in social life illuminated his conversation. He had the gift of being an interesting talker, fresh and inspiring. Neither in public nor private utterances did he "talk down" to those who heard him. To talk with him and to hear him talk was both a delight and a privilege, particularly prized by ambitious young men who were stimulated by his discourse.

Early he found more delight in the lives of the Lord Chancellors than playing ball with boys of his age. He never learned to play. In youth, as when older, he walked with his head in the air, and did not escape the criticism in the small town that the young man "thought uncommonly well of himself." This before he was admitted to the bar. More so at the bar, prior to recognition that his ability justified loftiness of bearing. Lithe of figure, looking taller than his inches, with clear-cut features and with poise, mental and physical, he seemed to wear distinction as a garment. The word "lofty" fitted him as did no other word. When he spoke, his spare figure seemed to loom, and he appeared larger than he was. His flashing eyes and sincerity proclaimed that he was one on whom nobleness did rest. Some men are born with the purple of dignity and nobility. It asserts itself early and ripens with age. At first, critics regard it as a pose. Later they know it is natural and that such bearing is the hall mark of an excellent spirit. It might be truly said of Judge Connor, before as well as after he won recognition, in a lesser degree, what a hack driver said to me in Trenton of the Governor of New Jersey:

"Is Governor Wilson popular here?" I asked.

"The people respect him," answered the driver, "but I observe he walks alone."

Coming to North Carolina from Florida, Judge Connor's parents moved to Wilmington in 1844. In 1855, when the new county of Wilson was established, they became residents of its county-seat. In his new home his father, with saw and plane, worked skillfully in fashioning the Temple of Justice in the new county. The son with different tools made that courthouse indeed a Temple where justice was the property of all who entered its portals. Judge Connor at the age of fifteen lost his father, and his school days ended abruptly. But good teachers had pointed the way. He was a student and learner all the days of his life. Though he never attended high school or college, how many university graduates equaled him in mastery of knowledge? Laying down school books, he took up law books. His capacity and promise, later recognized by all, were appreciated by the leading law firm in Wilson, and he was taken into the law office of Judge George Howard and George W. Whitfield. It was a fortunate connection for him—not less so for the law firm. Judge Howard had gone on the bench at thirty and had become the most influential young leader of Democracy in Eastern North Carolina before the War Between the States. He early demonstrated an ability and fitness for public service that would have given him higher place in public life, if the political debacle following the war of the sixties and Reconstruction had not denied election to men of his faith in his district. The association of the able lawyer and the young law clerk grew into a friendship as beautiful and as lasting as any in song or history. George Whitfield, less widely known, was not less accomplished. Nor was he less attracted to the young man than was his daughter, Kate, who a few years later became Mrs. Connor. The young law student made himself indispensable to the firm. He won the confidence and regard of their clients, studied law at night and exercised almost a father's care over his brothers and sisters. Thus the young man grew in stature and in favor. Before being admitted to the bar, he enjoyed the advantage of reading law under the late Hon. W. T. Dortch, of Goldsboro, who had been a Senator in the Southern Confederacy, easily the Nestor of the bar of Eastern North Carolina. The attachment between instructor and student was broken only by the death of Mr. Dortch, to whose memory the pupil later paid high tribute.

In January, 1871, Mr. Connor was licensed by the Supreme Court to practice law, when he was only nineteen years of age. He had never known real boyhood. He had done a man's job and thought a man's thoughts. At nineteen he was fixed in his character and principles, and ready to become a member of the jealous profession. In the same year he was happily—I should say most happily—married to Miss Kate Whitfield. To an intimate friend he wrote in 1904: "Yesterday was the thirty-second anniversary of my marriage, and I have been thinking and rejoicing in the great blessing that came to me in my wife. She has been and is a tower of strength and comfort to me." Their children and grandchildren rise up to call them blessed, and are giving added honor to the name synonymous with patriotic service to their State. Thus though the law prescribed twenty-one as the age for admission to the bar, and there was an entrenched belief that a man should not marry before he attained his majority, we find him a lawyer and a husband at an age when most young men are in college. Though young, he was old beyond his years. If there was any thought that his obtaining his license before reaching the required age was contrary to the statute made and provided, no question was raised. Formalities were not so much insisted upon as now. The character of the examination was less searching, but, if it had been as thorough, young Connor had mastered his Blackstone and Adams and Chitty. Moreover, he had for several years drawn pleadings and had familiarized himself with the rules of practice.

Like Bartholomew F. Moore and some others who won distinction at the bar, Mr. Connor began the practice of the law at the county-seat of Nash. In a few months he returned to Wilson. After a short partnership with Howell Cobb Moss, who became Clerk of the Superior Court, he later formed a partnership with Hon. Frederick A. Woodard, who had a rare gift for friendship, and this partnership continued until Connor's elevation to the bench in 1885.

My early and pleasant recollections after quitting school center around the law office of Connor & Woodard. That firm not only appeared on one or the other side of the docket in nearly every case in Wilson County, but in important cases in the surrounding counties. It was more than a law office where clients repaired. It was the center of political and other activities of the community. These two able lawyers were retained by most of the leading business men and farmers, and their clients made other claims on them than for legal advice. People of substance and ideas and public spirit gathered at that law office, which was the clearing house of the town and county, to discuss and practically decide community programs. There subscriptions were made to allay suffering and want; there preachers and church officials met to plan church activities; there farmers came to discuss crops and politics. It was even said by some that it was a place of gossip and that candidates for office owed their selection to these gatherings. I recall as a small boy going into the office upon some errand and lingering to hear the talk of the inelligencia of Wilson and the politicians and business men and farmers of the county. Proud I was, when as local editor of the *Wilson Advance,* I was admitted into this goodly fellowship and learned the first steps in politics. It was in that office also that, after seeking and obtaining the advice of Connor and Woodard, the papers were drawn that gave me editorship of my first paper, the *Wilson Advance,* and from its members that I received wise counsel and admonition in apprentice days in journalism. That advice was not lacking in later years, though I hasten to absolve the memory of both Connor and Woodard from responsibility for any of the paper's policies.

Few things were done or enterprised in that county between 1875 and 1885 that did not originate in that law office. The active political leader was the junior partner, Mr. Woodard, afterwards the distinguished and able Representative of the Second District in Congress, and a tower of strength in financial affairs in the community as well as in law and politics. Unlike in many ways, these partners were alike in ability, in keen interest in all that concerned man, in giving themselves and their leadership in ways that were as useful as they were unselfish. Wilson was the only Democratic County in the Second District, which was for years represented in Congress by a Negro. It was held in that column in those years because its people were fundamentally Democratic and because their leaders were men of wisdom and political sagacity. And the most influential of those leaders were Henry G. Connor (always called "Groves" by his friends) and Frederick A. Woodard. If they were successful, it was because they stood for high ideals and supported men who incarnated sound principles. They led the fight for Jarvis for Lieutenant-Governor in 1876 and afterwards for Governor and for United States Senator. The friendship between them and that wise chief executive was close. He leaned upon them as they supported his educational and industrial policies, and this intimacy ended only with death. They also championed the nomination of Governor Scales in 1884, and it was largely to their zeal and organization that he carried so large a vote in that section of the State against his eloquent opponent. It was to such friends and counsellors that Aycock turned in his public life, as well as in his early career at the bar. They shared with him the vision of an educated commonwealth and upheld his hands with unselfish coöperation.

In the 1881 ill-fated campaign for State prohibition, to bear the fruit of victory later, Mr. Connor gave it earnest support by speech and pen in a county overwhelmingly against it, although political ambition would have suggested opposition or silence. The next year he was nominated for the State Senate, but the reaction from the prohibition campaign jeopardized party success with a dry candidate. Accepting the situation, and having more regard for party success than personal promotion, he voluntarily surrendered the nomination, and contributed largely to holding his party together in the face of the danger of a split on the wet and dry question. That act of self-abnegation impressed the electorate, and in 1884 he was again nominated and elected. "To renounce and not be embittered" is one of Stevenson's tests of nobility. This self-effacement, along with courage to stand alone, bore its reward. Afterwards in every crisis the people of his county and district called him to leadership and gave him in other practical ways evidences of their friendship.

The Senate of 1885 left few permanent statutes. It held the rudder true. Public revenues were too small to permit more than slow and steady progress. It is rare that the chairmanship of the judiciary committee goes to a new Senator. The fact that by common consent it went to Mr. Connor is proof that his high standing at the bar was already recognized. The one outstanding statute of that General Assembly is known as "The Connor Act," which required the registration of deeds. It brought needed security to titles to land. A distinguished judge called it "the most useful piece of legislation affecting property on our statute books."

When in the summer of 1885 Governor Scales was called upon to name a Superior Court Judge of the newly created district in which Senator Connor resided, though that district contained, among others, such prominent lawyers as Joseph J. Davis, Charles M. Cooke, Benjamin H. Bunn and Jacob Battle, people and bar by common consent wished Senator Connor to be named, and the Governor appointed him. Governor Scales had the right conception of the judiciary, as shown in that and other appointments to the bench, which distinguished his administration. Soon Judge Connor was accorded the same recognition by the whole State which had been given in his district and in the Senate. He held court from Currituck to Cherokee, everywhere winning the regard of the people and the respect of the bar both for his courtesy and his profound knowledge of the law. Nothing makes up for the latter qualification in a judge. The salary of a Superior Court judge in that era was $2,500 with requirement to preside in every county in the State, and with no allowance for expenses. Having no outside income, with increasing family responsibility, financial considerations impelled him in 1893 regretfully to resign and return to the active practice of the law. In 1894 the leader of the fusion forces nominated what they called "a nonpartisan judicial ticket," and placed Judge Connor on it for Associate Justice of the Supreme Court. They named another Democrat, Justice Walter Clark, already on the Supreme bench, and the nominee of the Democratic party, for reëlection. The idea of a nonpartisan judiciary appealed to Judge Connor. Some of his closest friends, confident that the Fusionists would win that year, urged his acceptance, believing that he and Clark, and a Populist of Democratic training, could hold the rudder true in the Supreme Court and keep it free from political bias during the perfervid political bitterness that was sweeping the State. Their prediction of victory for the Fusionists was realized. Upon reflection, however, Judge Connor declined to permit the use of his name, since his party had already named the sitting Democratic Justices as their candidates. He was unwilling to be voted for against party associates, whose service on the bench rightly entitled them to a continuance on this Court.

Judge Connor did not escape some criticism on the part of militant Democrats because he did not immediately repudiate in severe terms the use of his name by the Fusionists. These critics believed the Fusionists were not actuated by the motive to secure a nonpartisan judiciary, but had placed Clark and Connor on their ticket to avoid criticism while they were careful to secure a majority of the Court from their parties, fused into one for that campaign. Always courteous and considerate, Judge Connor declined the advice to rebuke those who sought to honor him, but at the same time firmly declined to permit himself to be a candidate against a Democratic Justice. He also declined a commission as trustee of the Agricultural and Mechanical College for Negroes in Greensboro sent him by Governor Russell. "Would it be rude for me to respectfully decline?" he asked Judge Howard. "I am determined not to be drawn into any position having the slightest connection with public affairs." His self-abnegation in putting aside the judicial nomination, as when he resigned the nomination for the State Senate in 1882, gave proof of his party fealty. It was in the future, as in the past, to bring appreciation and reward.

In 1898 he responded to the call of the people to lead the fight in Wilson County as candidate for the House of Representatives to restore his party to power in order to end the Fusion regime. That was a memorable campaign. "White Supremacy" was the Democratic slogan. The calm, judicial, moderate Connor was so aroused that when he spoke to thousands of determined men in that campaign, a friendly critic said he could think of no figure in history so like Connor that day as Robespiere. If he preached near revolution, it was not in hate of the Negro, for he was always his helpful friend, but rather in love of his State. He possessed the power to convince and arouse, thus referred to by Goldwin Smith: "No orator, however perfect his art, can hardly be impressive without weight and dignity of character." He would save whites and blacks from what he regarded as intolerable conditions. Writing on October 2nd, in the midst of the campaign, to Judge Howard, he revealed his own feeling and gave a glimpse of the serious situation existing:

"I am making a campaign of which I shall never be ashamed. I am trying in some measure to pay my debt to the people of this country, and it is very gratifying to see that they understand me and my feeling. There were from 6,000 to 7,000 people here today. I do not think any man ever had a more loyal or cordial demonstration than they gave me today. . . . I pray the present condition may pass away without violence or bloodshed, and that our people may be wiser and understand each other better. I feel a strong desire to speak to the Negroes and let them understand how I feel toward them, but just now I would not be understood."

Though serving his first term as Representative, Judge Connor was chosen Speaker, the contest in the Democratic caucus being between him and two popular and experienced members of the House, Lee S. Overman, of Rowan, later to become United States Senator, and Locke Craig, of Buncombe, afterwards Governor. It was an historic session, featured mainly by the drafting and submission of a consitutional amendment regulating suffrage, by the revising of election laws, and by the repealing of what the majority regarded as partisan legislation which had caused the uprising of the people of the State in 1898. That General Assembly and its successor, of which Judge Connor was also a member, contained more able men, who afterwards were elevated to high station, than any similar bodies of half a century. He was one of the leaders who had part in framing the constitutional amendment. They accepted the Louisiana "Grandfather Clause," in preference to others suggested, because it left no door open to dishonesty in execution. Judge Connor was deeply concerned with securing an honest election measure, and was in conflict with those who wished a law through which a coach and four could be driven. The Fusionists had enacted a one-sided law to aid them. Some Democrats wished to do likewise, to Judge Connor's dismay. He sincerely desired an educated electorate and elections above suspicion, and he strove for both. "He was too fond of the right to pursue the expedient." After his election in November (1898) Judge Connor, thinking aloud in a letter to Judge Howard, wrote:

> "The politicians have stirred the minds of the people more deeply than they intended. I find many men, who would have read me out of the party in 1894, now insisting I must take the lead in working the problem out. I am determined that, with my consent, no law shall be passed, having for its purpose or permitting frauds. I am willing to throw every possible constitutional restriction around the registration, but when the vote is cast it must be counted and honestly returned. I want the final conclusion to which we arrive put in the Constitution, and I want, if possible to secure the permanent undivided political supremacy of the white man. I think this is essential to the peace of our people. We must take the responsibility and have the power. When done we can no longer excuse ourselves from discharging our duty in regard to the Negroes of the State, but we must bear the responsibility like men, like sane, virtuous, high-minded citizens. A man who has no higher conception of what 'white supremacy' means in North Carolina than the subordination of an inferior to a superior race is an unpatriotic citizen."

He returned again and again to the future of the State under the suffrage restriction, writing in November, 1902:

> "It is a serious question whether 100,000 free men can maintain any satisfactory status in North Carolina without any political power or influence. I regret very much that we did not insist upon enlarging the suffrage by permitting any person otherwise disqualified, who possessed $300 worth of property, to vote."

In the interim between his retirement from the Superior Court bench in 1893 and his election as Supreme Court Justice in 1902, in addition to his engrossing law practice and his interest in public affairs, Judge Connor served as president of the Branch Banking Company of Wilson, having been made one of the executors of the large A. Branch estate. In administering this trust and as president of the bank, he proved faithful and efficient, the estate was handled wisely and under his management the bank grew into one of the strongest financial institutions in the State. He had respect for captains of industry and as legislator and judge was zealous to uphold property rights and to hold the scales of justice evenly between the weak and the strong. Personally, money-making never interested him. He had no urge to amass a fortune. His ambitions were wholly along other lines, and he ever recognized that the law was a jealous mistress. He thus expressed this opinion about the dangers of the love of money in 1902 in a letter to Judge Howard: "I do not believe it possible for any man who is inordinately fond of money to be a great man."

The educational history of North Carolina in the years he was in public life could not be written without reference to the contributions to public education by Judge Connor. In the early eighties, long before the inherent right of every child to school privilege at public expense was a recognized principle in North Carolina, he was one of the leaders in the movement in the conservative town of Wilson to levy a tax for the establishment of a graded school, which was won after a hard contest. In that decade there were those who held that to tax one man to educate the child of another was unjust. When, later, the movement was inaugurated for legislation applying the taxes of white people exclusively to children of that race, leaving to Negro children only such schools as could be supported by taxes paid by Negroes, it received the disapproval of Mr. Connor in a day before "the white man's burden" was generally recognized and carried out. In these matters, ahead of his time, he was a disciple of Horace Mann. He shared, in some degree helped to strengthen, the sound views which, under the leadership of his friend, Governor Aycock, after 1900 became the educational creed and glory of North Carolina. As Senator in 1885, and as Speaker of the House of Representatives in 1901, the forces of education relied upon Judge Connor's intelligent and deep interest to increase the State's educational advantages.

Historians and students of the history of the State have been at a loss to understand the slow progress made in public education from the eighties up to the inauguration of Aycock. One barrier was the lack of resources and the inability of the people to pay the necessary taxes. Another was the slow acceptance of the State's duty to public education. But the chief obstacle was the Barksdale decision of the Supreme Court rendered in 1885. As long as that decision stood, no Moses could strike the rock from which would gush forth the healing streams. Legislative acts as to special districts could and did save the towns from the blight that denied good schools to children in villages and countryside. Because Judge Connor helped to free the school system, let us take a glance at the judicial fettering and unfettering of public schools.

The Constitution of 1868 made it the duty of the General Assembly to provide "by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years." It also declared that "one or more public schools shall be maintained at least four months in every year," and "if the commissioners of any county shall fail to comply with the aforesaid requirements of this section (that is, as to maintenance of schools for the minimum time) they shall be liable to indictment." The Constitution further provided for what was known as the "constitutional equation" between the tax on polls and the tax on property, fixing a constitutional limitation of tax on property of 66⅔ cents on each $100 valuation.

The General Assembly of 1885, of which Judge Connor was a member, directed that if the amount raised by the general State tax was not sufficient to maintain the public schools for at least four months, the commissioners should levy an additional tax to raise the required amount. The validity of this statutory provision was challenged in Sampson County. It was conceded that there was a conflict in the Constitution and the Court was required to decide which provision should control. The case came up from Sampson County on an appeal by the defendant from a judgment of the Superior Court.

It was held in the *Barksdale case,* in opinion written by *Smith, C. J.:*

> "1. While it is the duty of the county commissioners under Article IX, section 3 of the Constitution, to levy a tax sufficient to keep the common schools open for four months, in each year, yet

> in discharging this duty, they cannot disregard the limitation imposed as to the amount of the tax to be levied by Article V, section 1.
>
> "2. The act of the Legislature of 1885, chapter 174, section 23, which allows the commissioners to exceed this limit is therefore unconstitutional.
>
> "3. The act does not come within the provisions of Article V, section 6, which authorizes a 'special tax' for a 'special purpose,' with the approval of the Legislature.
>
> "4. When the Constitution imposes a duty and provides means for the execution which prove to be inadequate, all that can be required of the officer charged with the duty is to exhaust the means thus provided."

Fortified by quotations from opinions by *Chief Justice Pearson* and other eminent jurists, *Associate Justice Merrimon*, after quoting the Constitution commanding the maintenance of public schools "at least four months in every year" and "*shall* provide by taxation and otherwise for a general system of public schools," said:

> "This important purpose being thus treated as fundamental and essential, and being so specially provided for, the intention that it should and must be executed at all events, as prescribed, could scarcely be expressed in plainer or more commanding terms. No provision of the Constitution is clearer, more direct and absolute. Its framers, whatever else may be said of their work, seem to have been specially anxious to establish and secure, beyond peradventure, a system of free popular education. They declared it was essential to wholesome government and human happiness, thus indicating its transcendent importance. Hence, the purpose was made special, and specially provided for; it was treated as important and essential, and the Legislature was, as it seems to me, required in imperative terms, and, at all events, to execute it by taxation, as well as by other means, and to emphasize and enforce the command, it was made indictable to fail to maintain such school for four months in each year. How was this to be done? How could it be done without money? And how was the money for this great purpose to be raised? Is it not manifest that it was contemplated that money sufficient for it would be raised by adequate taxation, and, if need be, without regard to the limitation upon the general taxing power of the Legislature, just as in the case of raising money to pay the public debt, supply a casual deficit in the treasury, or to suppress insurrection or repel invasion? The provisions of the

> Constitution, in the last-mentioned respects, are not stronger or more imperative than those in respect to public schools—indeed, generally, they are much less mandatory, and appear only by reasonable implication."

It has been said, and not without a measure of truth, that the great dissenting opinions of appellate courts have kept fresh and strong the growth of justice. Certainly it is true that the dissenting opinion of today, if it is founded upon sound principle, is the law of tomorrow. *Stare decisis* has too often upheld ancient rights and prerogatives. It has never initiated the necessary departure from ancient precedents. The opinion of the Court was rendered by that learned and honorable *Chief Justice W. N. H. Smith,* and the dissenting opinion by the *Associate Justice Merrimon.* By way of parentheses, may I venture the expression of opinion that in high character, in dignity and in ability, this Court has not more fully commanded the confidence of the people than when *Smith* and *Ashe* and *Merrimon* adorned the bench. The dissenting opinion rendered by *Justice Merrimon* has long been regarded as a judicial Magna Charta of public education in our commonwealth. This was not fully realized until a score of years afterwards when the Barksdale decision was reversed by the Supreme Court, of which Judge Connor was then a member.

May I be pardoned for a sidelight upon the attitude of a portion of the press toward the courts of the day before the judiciary enjoyed freedom from review by the Fourth Estate. Only a few weeks previous to the rendering of that decision I had been licensed to practice law. With the assurance of a young limb of the law, not yet fully conscious of how little a fledgling knows, as editor I assumed to reverse the decision of the majority of the Court. This was before I became conservative in comments upon the judiciary. Not content with editorially reversing the Barksdale decision, I essayed the rôle of prophet and predicted that the day would come when the dissenting opinion of *Associate Justice Merrimon* would become the law of this commonwealth, which had its face toward the future. I am afraid the young editor intimated that the two distinguished, able jurists who had, as he thought, hobbled educational progress, had been reared under an environment where the rights of property held supremacy, and in a day when public schools were deemed to be established for poor children and were therefore poor schools. The editorial literally glowed with praise of the dissenting opinion. It was called "great" and as "ushering in a new judicial vision." *Judge Merrimon* was held up as the great judge who deserved a place with the immortal jurists. A little later I was invited to dine at the home of *Judge Merrimon.* No invitation came to dine with either of the other *Justices,* though the next year, and thereafter until he died, it was my good fortune to sit daily at the same table with *Judge Ashe,* where his courtesy and true nobility won my heart and admiration. If he ever read the editorial, he was so generous as never to mention it, and I have no doubt charged up any crudity to the propensity of youthful cocksureness. Equally good-humored was the attitude of the dignified *Chief Justice,* whose opinion had lacked editorial approval, as this incident related to me by Hon. Charles W. Tillett, of the Charlotte bar, the day after it occurred, shows:

"As *Chief Justice Smith* was leaving the Court," said Mr. Tillett, "I joined him and walked with him toward his home. I admired him genuinely. His greatness filled my eye, and as we walked, I said to him, 'You must be a very happy man, *Mr. Chief Justice.*'

" 'Why do you think so?' he asked.

"I recounted," said Mr. Tillett "his long leadership at the bar, following his distinguished service in Congress, and said:

" 'If I thought when I reach your years I would have attained your high distinction, with the regard and admiration of the profession and the State, I would be supremely happy!' "

"With a characteristic and grim smile, the *Chief Justice* replied:

" 'Ah, Brother Tillett, you may think so, but you would not be happy, seeing that your best prepared opinions are reversed by the youthful editor of the *State Chronicle,* even without so much as saying 'by your leave.' In view of this situation, can you call my position one to be envied?' "

When I next saw Judge Connor I told him the Tillett story and was gratified to find that he held the view *Justice Merrimon* had presented in his dissenting opinion. Though he would not have expressed himself so strongly as the *State Chronicle* did (he may have then seen himself a future member of this tribunal with the natural judicial feeling that the press sometimes errs) he enjoyed the Tillett story, but pointed out the danger of editorial reversal of Supreme Court decisions. "You know," he said, "the presumption is that the Court is right, even if in some cases it is a violent presumption." This declaration made in 1885 was not forgotten by the advocates of public education. When in 1907 Dr. J. Y. Joyner, State Superintendent of Public Instruction, arranged to test whether the Barksdale decision could longer retard better school facilities, I knew in advance that *Justice Connor* would unloose the Barksdale hobble in public education. All the school men felt then as always that the cause had in him a defender, whether as citizen, legislator, or judge. The case came up from Franklin County—*Collie v. Commissioners,* 145 N. C., 171—and was heard on appeal by plaintiff to the Supreme Court. It is interesting that Charles B. Aycock was of counsel for the parties seeking to have the Barksdale decision overruled. As I heard the case argued my mind went back to the days in Wilson in the early eighties when Connor, to go on the bench, and Aycock to be the Educational Governor, were laying deep and broad the foundations upon which they rose to fame.

The Barksdale case was expressly overruled. It was held by a unanimous Court that "The Constitution must be construed as a whole to give effect to each part, and not to prevent one article from giving effect to another article thereof, equally peremptory and important. While Article V of the Constitution is a limitation upon the taxing power of the General Assembly, Article IX thereof commands that one or more public schools shall be maintained at least four months in every year in each school district in each county of the State, and should be enforced. Hence Revisal, sec. 4112, providing that, if the tax levied by the State for the support of the public schools is insufficient to enable the commissioners of each county to comply with that section, requiring four months school, they shall levy annually a special tax to supply the deficiency, is constitutional and valid, though exceeding the limitation of Article V. Anything beyond would be void." The able, unanimous opinion of the Court was written by *Justice Brown,* who relied upon and approved the principle laid down by *Justice Merrimon* in his great dissenting opinion. It is a matter of knowledge that *Justice Connor* was deeply interested in this reversal and rejoiced, as did all public school advocates, that the fetters had been removed, and that he had a voice in the reversal.

It may not be amiss to congratulate ourselves that this change of interpretation in the interest of public education is indicative of the consistent attitude of the Court in the years that have followed, as was particularly illustrated in the case of *Tate v. Board of Education,* 192 N. C., 516. That case, the unanimous opinion of the Court, emphasizes the constitutional duty of the General Assembly to provide by taxation and otherwise "for the maintenance of the public schools for a time of not less than six months in each year. The counties are mere administrative agencies for the maintenance and operation of the schools. It is the duty of the General Assembly to provide the funds, and of the counties to see that they are expended in the maintenance of schools for the minimum time." If proper credit is given to *Associate Justice George W. Connor,* son of Henry Groves Connor, who succeeded his father as Speaker of the House of Representatives, as Superior Court judge and as Supreme Court Justice, for writing the opinion of the Court, is it not permissible to say of his father that "though dead, he yet speaketh?"

After becoming Justice of the Supreme Court, and later of the United States District Court, Judge Connor evidenced his continued interest in education. He responded to a call to teach law in the Summer Law School at the University of North Carolina, was urged to go to Chapel Hill as a professor in the law school. The invitation appealed to him, for as he grew older he drew nearer to youth. He was greatly tempted to round out his life in guiding the study of those who, in the years to come, would make and practice and interpret laws of his native State. What a benediction it would have been to the ambitious young manhood of North Carolina! The noble presence and guidance of one so rooted in true greatness at the University of the State would have provided an atmosphere which would have heightened the distinction of that institution which had always been very near Judge Connor's heart.

Judge Connor's life educational record is that, though denied public school or college or university training, his whole career illustrated his deep interest in providing the best opportunities for the youth of his town, county and State in its ever improving system of public schools from the lowest grade to the university. He was in the eighties a constructive pioneer, of which his friend Aycock was the most eloquent and convincing voice, and ended his educational career as sometime lecturer on law at the University of his State.

No man in North Carolina played a more important part in both judicial and legislative capacities than Judge Connor in removing the vested privileges under which the railroads of the State were escaping taxation. For sixty years the Wilmington and Weldon Railroad had avoided taxation through a provision in its charter granted in 1833 when at the outset of railroad development in America, North Carolinians were anxious to facilitate the building of these new iron lines of transportation across the State. That charter, granted by the General Assembly declared:

"The property of said company, and the shares therein, shall be exempt from all public charge or tax whatsoever."

That provision, and similar provisions in the charters of other roads, grew in injustice as the years passed. High rates and mounting profits of railroads brought not a cent in return to the State whose products were making the railroads rich. Growing sentiment against such a situation put the question into the courts, and at its January Term, 1870, the Supreme Court of North Carolina, in *R. R. v. Reed* (64 N. C., 227), held that notwithstanding the provision, a tax levied upon the franchise of the railroad company, by virtue of a statute enacted in 1869, was valid. In the opinion written by *Chief Justice Pearson* it was stated:

> "By its charter, the Wilmington & Weldon Railroad Company has a franchise; and a provision is inserted therein, that 'the property of said company and their shares therein shall be exempted from any public charge or tax whatsoever.' *Non constat* that the franchise is not the subject of taxation; and the fact, if it be so, that the property of said company is exempted from liability to taxation for all time to come, only makes the franchise so much the more valuable, and on the *ad valorem* mode of taxation, there can be no difference."

The decision was sustained upon the authority of *R. R. v. Reed* (64 N. C., 155), decided at the same time, and involving the identical question. The order of Judge Watts in the Superior Court declining to vacate an order enjoining the collection of the tax on the company's franchise, was reversed. The contention of the railroad company in that case was that its charter, granted by the General Assembly, was a contract between the State and its stockholders, upon the principle of the *Dartmouth College case.* It was therefore contended that the tax was invalid as in violation of the Constitutional provision against impairing the obligation of a contract. Our Court, conceding that the *Dartmouth College case* was authoritative, held that the charter provision should be strictly construed, and that there was a distinction between the property of the corporation and its franchise. Upon such a distinction it held the tax on the franchise to be valid.

On a writ of error the railroad carried the case to the Supreme Court of the United States, where the decision of our Court was reviewed and reversed. *Justice Davis,* who wrote the opinion, said:

> "It has been so often decided by this Court that a charter of incorporation granted by a State creates a contract between the State and the corporations, which the State cannot violate, that it would be a work of supererogation to repeat the reasons on which the argument is founded. It is true that when a corporation claims an exemption from taxation, it must show that the power to tax has been clearly relinquished by the State, and if there be a reasonable doubt about this having been done, that doubt must be resolved in favor of the State. If, however, the contract is plain and unambiguous, and the meaning of the parties to it can be clearly ascertained, it is the duty of the Court to give effect to it, the same as if it were a contract between private persons, without regard to its supposed injurious effects upon the public interests.
>
> "It may be conceded that it were better for the interest of the State, that the taxing power, which is one of the highest and most important attributes of sovereignty, should on no occasion be sur-

> rendered. In the nature of things, the necessities of the government cannot always be foreseen, and in the changes of time, the ability to raise revenue from every species of property may be of vital importance to the State, but the courts of the country are not the proper tribunals to apply the corrective to improvident legislation of this character. If there be no constitutional restraint, in the action of the Legislature on this subject, there is no remedy except through the influence of a wise public sentiment, reaching and controlling the conduct of the law-making power."

By this decision the United States Supreme Court, while intimating that it wished the question was an open one, overturned the State Court's attempted distinction between the property and the franchise of the railroad. Thus in 1871 the improvident grant of the Legislature of 1833 was still the law of the State despite the fact that the State Constitution of 1868, looking to the future, expressly provided that the principle of the *Dartmouth College case* should not apply to charters granted by the General Assembly.

Despite the decision, during all the years between 1871 and 1889 the sentiment against the tax exemption grew. Some other railroads paid taxes, all the ordinary citizens and corporations did and the sentiment of injustice mounted into a feeling akin to resentment. The *State Chronicle* had more than once urged the General Assembly "to make or find a way" to end this immunity, but until 1891 there seemed to be an immovable impasse.

Governor Fowle, who shared the feeling against the immunity, determined to bring the matter again to a judicial determination. He believed that at least the branch lines of the Wilmington & Weldon Railroad were not sheltered under the immunity of the charter. By authority of the General Assembly, asked at the instigation of Governor Fowle, the newly created Railroad Commission assessed for taxation the portion of the Scotland Neck branch of the Wilmington & Weldon Railroad Company lying within Halifax County. In order to make a test case, Sheriff Allsbrook, of Halifax, attempted to collect the tax. Governor Fowle employed Robert O. Burton and S. G. Ryan to represent the State in its contention that the branch lines were not exempt. The railroad, as was expected, flew into court. On the bench was Judge Henry Groves Connor.

After a hearing in the Superior Court at Wilson, in which Mr. Burton made an argument which won high commendation, and the railroad attorneys reiterated the arguments about the charter contract, Judge Connor dissolved the injunction which the road had secured, holding that the branch lines were not exempt. Judge Connor's view ran counter to the prevailing opinion of the legal profession, and, contrary to his usual custom as Superior Court judge, he wrote his decision and sent me a copy at the time. In the main it followed the general line later laid down by the Supreme Court of North Carolina when it affirmed his decision. It is to be regretted that his written opinion cannot be found.

When the case came up for hearing in the State Supreme Court, the justices were divided in their opinion. It does not often happen that the inside story of the discussions on a closely contested case in the Supreme Court reaches beyond the doors of the conference room, and in this case few knew at the time what was going on. When the case came up in conference, *Justice Davis* was ill and unable to be present. *Justices Avery* and *Clark* favored affirming Connor's decision. *Chief Justice Merrimon* thought that Connor should be reversed, believing that the decision of the Supreme Court of the United States guaranteed the immunity not only of the main line, but of the branch lines as well. *Judge Shepherd,* stating that the question was one upon which it was difficult for him to reach a conclusion, asked that the case go over until the Fall Term so he might have opportunity to give more time to its consideration. That was the narrow margin at the first conference. Shortly thereafter, feeling that he ought, even at the risk of his health, to give the decisive vote for ending exemption, *Justice Davis* came in a closed carriage to the Supreme Court room where he remained only long enough to vote to affirm Connor's decision. It was his last appearance at the Court. His closing judicial act was illustrative of a long and honorable career, where duty was the watchword of that noble man. Like his able colleagues, *Justices Avery* and *Clark,* and like Connor, he was keen to embrace the opportunity, when it could be done properly and legally, to deny immunity unless it was nominated in the bond.

What might have been the result if the case had gone over to the Fall Term can be only surmised. The legal issue involved was recognized as a close one. The successor to *Davis* might have taken the view entertained by the *Chief Justice.* If so, and if *Justice Shepherd's* study should have caused him to reach a like conclusion, which was not impossible or even improbable, the Wilmington & Weldon Railroad and other roads would have continued to enjoy exemption from all taxation, probably perpetually, certainly for years. How narrow is the margin in great issues in the courts and in public affairs! The eight to seven decision in the Hayes-Tilden contest is only one of the outstanding proofs of the uncertainty of court or commission determinations.

There are learned judges whose habit of mind never permits them to reopen a legal question once decided. *Stare decisis* is with them as binding as one of the Ten Commandments. Let a question be passed upon in an appellate court, and they accept it as binding, no matter what changes occur. Jefferson admonished against slavish adherence to precedent upon the part of members of the judiciary, and pointed out how it often resulted in the miscarriage of justice. It was fortunate for North Carolina at that juncture, for its educational and other progress which were hampered by lack of revenue, that this tax case came before a Superior Court judge of Connor's readiness to follow the right, and to depart from former rulings when justice demanded it. Fortunate, too, that the Supreme Court contained likeminded men. Again fortunate that the decision of the Supreme Court on the case was written by *Justice Clark,* who had no reverence for precedent when it contravened his sense of right. His ingrained hostility to privilege in whatever guise it appeared ran through his opinions. In his opinion, in which the Court affirmed Judge Connor's decision, *Justice Clark* (110 N. C., 137) said that the defendant was forced to concede that under the decision in *R. R. v. Reed* by the Supreme Court of the United States, the main line was exempt from taxation by the State. *Judge Clark,* however, did not personally accept that view, for he called attention to the language of *Justice Field,* of the Supreme Court of the United States, in the *Delaware Tax Case* (18 Wall., 206), which he declared was significant. That language is as follows:

> "If the point were not already adjudged, it would admit of grave consideration whether the Legislature of a State can surrender this power (*i. e.,* the power of taxation) and make its action in this respect binding upon its successors, any more than it can surrender its police power, or its right of eminent domain. But the point being adjudged, the surrender when claimed, must be shown by clear, unambiguous language which will admit of no reasonable construction consistent with the reservation of the power. If a doubt arises as to the intent of the legislation, that doubt must be resolved in favor of the State."

Having in mind this rule, the Supreme Court of the State, and afterwards the Supreme Court of the United States affirmed Judge Connor. In its opinion (36 L. Ed., 973), written by *Chief Justice Fuller,* the United States Court declared: "We concur with the State Court in the conclusions reached, as sustained by reason and authority."

As a result of these decisions, it was established that only the main line of the Wilmington & Weldon Railroad was exempt from taxation by the charter of 1833. The ending of this main line exemption followed soon after the loss of immunity on the branch lines. In the Legislature of 1893 the Wilmington & Weldon was forced to capitulate. The State found its way to end exemption in the expiration of the charter of the Petersburg Railroad, an essential branch line of the Wilmington &

Weldon system. That charter expired in 1891, and the railroad in the midst of the fight to end its tax immunity, immediately began bargaining for a renewal. It made a proposition to pay $20,000 as an annual tax if the State in return would give it certain privileges, including the renewal of the Petersburg charter. The Petersburg charter was the lever the State needed to pry off the tax exemption. Though a legislative committee approved the railroad's proposal, it was firmly declined by the Legislature after a bitter controversy which at one time threatened the exposure of officials charged with improper action to help the railroad. The result of the memorable conflict, in which Senator Benjamin F. Aycock, of Wayne, had the laboring oar, was that a compromise was entered into by which the Petersburg charter was renewed for only two years and an act passed forbidding the construction of a parallel line. When the two-year period expired the Wilmington & Weldon was forced to relinquish all tax exemption and the State rechartered the branch road.

Possibly the railroad would have fought to the end had it not seen the definite legal trend against its claims as enunciated by Judge Connor in the *Allsbrook case.* That far-reaching decision has resulted in putting on the tax books the properties of the Wilmington & Weldon Railroad, now the Atlantic Coast Line, which were assessed at $56,195,691 in 1928, and millions more of other railroads indirectly affected by the decision in the Allsbrook test case. In addition to paying the *ad valorem* tax on this huge sum to counties, school districts and municipalities through which it runs, that road in 1928 paid into the State Treasury $1,392,254. Other roads which in 1890 were claiming tax exemption also enrich the State and make possible its progress.

Again in 1901, this time as a legislator, Judge Connor played an important rôle in forcing the railroads to pay a just tax upon their vast properties. While the excitement incident to the impeachment trial was stirring Raleigh and the State, another controversy was also troubling Judge Connor. Throughout the Russell administration the railroads had been supremely active in politics, first in opposition to Russell, and, after Russell's capitulation, to the Railroad Commission, causing changes in its membership. Afterwards they fought against a demand on the part of the people themselves for higher railroad taxes.

The *News and Observer* and other articulate forces in the State in 1901 were demanding a complete reassessment of the roads. The *Morning Post* and other railroad partisans charged that an attempt was being made to saddle the railroads with unjust taxes. The *News and Observer* urged the Legislature to increase the taxes on the railroads, warning them in the words of Jeremiah Black that by dereliction of duty on the part of the Legislature "the little finger of the corporations has become thicker than the loins of the commonwealth." This controversy faced Aycock as he came into office. Judge Connor, as a friend of the Governor and as a member of the House, ably assisted the Governor in seeking a satisfactory solution to the controversy. Unbosoming himself, as was his wont, to his close friend, Judge Howard, whom he called "my nearest and dearest friend," we find Judge Connor writing on 25 January, 1901:

> "I get very much disgusted with the tactics of the presidents (railroad). They seem to have been so long in the habit of doing things by indirection and force that they cannot understand the motives of candid, honest men. There seems to be a Tallyrandish code of conversation and conduct with them."

The railroad executives and officials not only came to the sessions of the Legislature in person in their private cars, attended by a retinue of lawyers and agents, but were clearly seeking to influence legislation in ways that did not comport with Judge Connor's sense of proper ethics. He did not feel free, because he hoped to aid in a satisfactory adjustment of the heated controversy with the three big railroad systems, to speak his mind frankly in public, but "his Irish was up" literally and otherwise. This is evidenced by the following expression in a letter to Judge Howard in February: "I would not be a railroad president for all the gold of Arabia or the wealth of India. It is evident that they usually deal with either sycophants or scoundrels."

Before going to Raleigh (24 December, 1900), writing to Judge Howard, he disclosed the railroad attitude and his own views:

> "I think from the investigation which I have given the subject and the determination of the counsel of the railroads to prevent the investigation, that we will show that the present assessment is very far below the value. I am opposed to a gross income tax, but I am more opposed to permitting Judge Simonton to interfere with the right of the State to collect her revenues."

Governor Aycock and Judge Connor were very solicitous to secure a settlement of the differences between the State and the railroads. So much so that Judge Connor requested the aid of Judge Howard, who maintained friendly relations with the Wilmington & Weldon Railroad officials. Here is the recorded story of a conference, that looked toward concessions and adjustments, as told by Judge Connor in a letter to Judge Howard, written from Wilmington 3 January, 1901:

> "After two days of wrestling we—that is, Aycock, Mr. Elliott (representing W. & W. Co.), and myself—got to a point last night which, I am quite sure, will bring us to a settlement of the rail-

> road tax cases. I am very much gratified and relieved by this result. I did not see Mr. Walters (head of the Atlantic Coast Line), but Mr. Elliott said that they had requests from several sources urging a settlement. He is to see Colonel Andrews and the representatives of the S. A. L. at once and bring the matter to a head. I feel that it is very much better for all interests that a settlement be made."

The battle, which had raged for years, ended with the adoption of a preamble and resolution of the General Assembly carrying out the terms of the agreement.

Governor Aycock rejoiced that the long controversy could be ended, and leaned upon Judge Connor's counsel. It began with crimination and recrimination. It ended with a compromise, which, though not entirely acceptable, ended litigation and legislation which had held first place in popular attention for ten years. Judge Connor rejoiced to see a final settlement which healed the breach between the railroad and the State. He cared more for seeing a future sound policy established than immediate enrichment of the treasury. He never did love to pray judgment if substantial justice could be obtained otherwise. In this happy termination Judge Connor rendered a service which helps the State for all time. It also witnessed the end of privilege long entrenched.

Nothing in his public life better illustrates the manner of Judge Connor's thought and action than his part in the impeachment of two Supreme Court Justices in 1901. The State had just emerged from a period of political excitement which it is impossible for any one to understand who did not live in those days of political strife and bitterness. In 1894 by a fusion of the Republican and Populist parties the Democratic party lost control of the State for the first time since Reconstruction days. The Fusion government, headed by Governor Daniel L. Russell, became so obnoxious by 1898 to most North Carolinians as to create a near revolution. The condition in some parts of the State was well described by Governor Aycock when he said:

> "Under their rule lawlessness stalked the State like a pestilence—death stalked abroad at noonday—'sleep lay down armed'—the sound of the pistol was more frequent than the song of the mocking-bird—the screams of women fleeing from pursuing brutes closed the gates of our hearts with a shock."

No picture can be drawn of the revulsion toward what came to be known as Russellism, due as much to the crudeness and the ill flavor of Reconstruction evils, as to the corruption on the part of the whites and blacks suddenly elevated to power. The turning over of government in eastern towns and cities to the control of Negroes and unfit whites jeopardized all that white men held dear. The indescribable conduct of some officials aroused the deep determination of Democrats and Independents to end the reign of terror and to restore peace and normal conditions. This rule of the Fusionists alarmed even some of those whose votes had helped to put them in power. The success of the Fusion movement in 1894 was made possible by economic disaster on the part of tillers of the soil. Four-cent cotton brought farmers to such distress as they had not known. Prevailing under the Democratic State and National administrations, farmers attributed their distress to that party. When Cleveland's policies ran counter to their economic beliefs, 50,000 farmers in North Carolina walked out of the Democratic party en masse. They joined the Populist party.

The bitterness that sprang up between Democrats and Populists, former political associates, had all the rancor of a family quarrel. Their estrangement made it easy for Republican and Populist politicians to organize a union of heterogeneous elements. It could not last, for oil and water cannot mix. The excesses and social disruption, followed by political distraction for four years, cemented the bulk of the white voters who, with the slogan of "White Supremacy," drove the Fusion administration from power. As an aftermath of the Fusion rule, came the impeachment by the House of Representatives of *Chief Justice David M. Furches* and *Associate Justice Robert M. Douglas,* both Republicans.

Upon coming into power in 1895 the Fusionists enacted legislation looking to displacing practically all Democrats still in office. This was followed by litigation over the right of the Legislature to displace an officer whose term had not expired. When the Democrats returned to power in 1899, they resolved to undo the work of the Fusionists. They enacted laws changing the functions of officials and sometimes changing the names of public agencies. A series of ousters and court decisions followed. The Supreme Court was composed of three Republicans, one Populist and one Democrat, who had been reëlected by all three parties in 1894. The partisanship of people and legislators permeated even to the chamber of the Supreme Court so that by 1900 the Democrats believed that the Fusionist Court was little more than a confirming body to hold Fusionists in office. The opinions of that Court, confirming the title of Fusionists in office, brought about in the conference of the Supreme Court as much ill feeling as existed in strictly political circles. *Justice Clark,* the only Democrat on the bench, wrote vigorous dissenting opinions against decisions of the Court. He declared that the judiciary was seeking at least a modified veto upon legislative action. He asserted in a dissenting opinion in the case of *Wilson v. Jordan* that "there is nothing in the Constitution of North Carolina indicating any intention to give the judiciary any supervision or control over the law-making power," and he added a sentence which aroused the ire of his Fusion associates when he said: "On the contrary, while the courts cannot pass, in any, the most remote degree, upon the title to the seat of any member of the Legislature, that body can sit in judgment upon any member of the Executive or Judiciary branches of the State government by impeachment and remove him from office." That declaration cut to the quick. *Judge Furches* was the most partisan of all the Fusion judges. He was regarded by Democrats as a man into whose soul the iron of hate of Democrats had entered, so much so that his judgment was believed to be biased in cases when the contest was between Democrats and Republicans. He deeply resented, and naturally, the suggestion of *Justice Clark* that impeachment and removal from office might be invoked. In fact he regarded it as a threat, even an incitement to impeachment of those judges who had upheld the contentions of Republican officeholders. His resentment found expression in an opinion when these words were used:

> "It has been suggested by a member of this Court that the Legislature has the power to impeach a judge—that it has recently done so, and that there is no appeal from its judgment. Such a suggestion as this has never occurred in the history of this Court until now."

And he closed with this language:

> "Why it should have been made we do not know. But remembering our positions as members of this Court, we will not express our sentiments as to such suggestions, and will only say that, in our opinion, any member of any court, who would allow himself to be influenced by such suggestions is unfit to be a judge."

We may be sure that these exchanges between two Supreme Court judges did not escape the vigilant eye of the press. The public was soon informed of the conflict of opinions between *Clark*, Democrat, and the Republican members of the Supreme Court. *Justice Clark's* intimation of possible "impeachment" was commented upon, and some papers went further and predicted that if Fusion members of the Court did not watch their step, they might face a Court of Impeachment. The tension and the growing conviction that partisan bias controlled the majority of the Court culminated on 17 October, 1900. The Legislature had abolished the office of Inspector of Shell Fish held by Theophilus White. The Supreme Court confirmed White's title to this office of which the Legislature had undertaken to deprive him. *Justice Clark*, Democrat, and *Justice Montgomery*, Populist, dissented. The majority of the Court relied upon *Hoke v. Henderson* for their action. Those who favored impeachment pointed out, by a review of the decisions in the officeholding cases, that they were not only inconsistent with *Hoke v. Henderson,* on which the Court relied, but were inconsistent with one another.

For example, in *Ward v. Elizabeth City,* the Judges held that the taking of new territory into the corporate limits of the city made it a different city, and operated to remove Ward from his office as city attorney, while in *McCall's case* they held that taking more territory (four counties) into the Western Criminal District did not make a new district, nor operate to remove the Republican from office. In *Day's case* they held that Day remained in his old office at his old salary, with his old duties and powers, and preserved the executive board to perform the new duties, whereas in *White's case* they put him in the new office, with the new salary, new duties and enlarged powers, thereby entirely destroying the board. Other inconsistent instances were cited. One Senator declared "As fast as their own ruling obstructed their power they were brushed away."

The order to pay White's salary was denounced as partisan by the Democratic press, which declared that payment of a salary to one undertaking to hold an office which had been abolished, was illegal and might bring trouble to the officials responsible for such diversion of public funds. Later a majority of the Court directed the Clerk of the Supreme Court to issue a mandamus to the State Auditor and State Treasurer to pay the salary of the Inspector of Shell Fish, but not before *Justice Clark* had written a vigorous dissent and had warned the State Treasurer that the Court could not legally order the payment of the money and that White's salary could only be paid when the Legislature made an appropriation for that purpose. However, upon the direction of the majority of the Court, the money was paid. And then the pent-up flood broke, producing the worst storm affecting the courts in half a century.

It was greater, perhaps, in fury and intensity than in Reconstruction days when *Chief Justice Pearson* said, "the judiciary is exhausted." In that era there was no impeachment of the judges who were severely criticized. The House of Representatives then brought articles of impeachment against the Governor instead, and he was found guilty and deprived of his office. The Republican judges then remained in office until their terms expired, but none of the members of that Court were reëlected.

The clear-cut issue presented to the people in 1901 was whether the action of the Legislature in choosing officials to carry on public duties could be overruled by a Court which they believed to be chiefly actuated by a desire to serve the party to which they belonged. As the time for the session of the Legislature drew near, some leaders of the Democratic party began to talk seriously about impeachment, "so that judges should be taught that there was punishment for partisan decisions." It is not of record, but it was generally accepted, that when asked about the matter before the Legislature assembled, *Justice Clark* told those who approached him that clearly *Furches* and *Douglas* were guilty of actions that made them amenable to impeachment. *Furches* and *Douglas* believed *Clark* had advised and was chiefly responsible for causing them to face impeachment trial. Certainly *Furches* and *Clark* were by that time bitter enemies. The judicial differences had become personal and hostile.

Upon the death of *Chief Justice Faircloth,* who had participated in the decisions criticized, *Justice Furches* was appointed *Chief Justice* by Governor Russell.

Partisanship may have been present—it doubtless was—but the controlling motive with most of those favoring impeachment was that a court, which had violated the Constitution for the benefit of an ousted fellow partisan, might in larger matters seriously affect the powers of the legislative department and deplete the treasury. They held also that punishment ought to follow the diversion of public money out of the treasury without an appropriation by the only body competent to make such appropriation.

On 31 January, Locke Craig, of Buncombe, afterwards Governor of the State, offered a resolution in the House of Representatives for the impeachment of *Justices Furches* and *Douglas.* The Democrats, with few exceptions, favored this impeachment resolution. The Republicans and Populists lined up against it, and the debate and the vote would probably have been almost along strictly party lines but for one thing.

Enter Henry Groves Connor, member of the House of Representatives from the county of Wilson.

Judge Connor had been Speaker of the previous House. He had won State reputation as Superior Court judge, and was esteemed as one of the first men of the State. He was honored and respected by all. He believed the majority of the Court had rendered a wrong and dangerous decision. He felt they had been influenced by partisan bias. He was convinced, however, that the punishment and crushing humiliation of conviction and ousting from office and disfranchisement, were penalties too severe for their offending. He could not bring himself to favor such serious sentence in the absence of personal corruption. Always given to introspection, he quietly pondered the matter. He read and reread the decisions. The more he read and the more he communed with himself, the more he felt that in conscience he could not stand with the majority of his party. He hated to break with them on a policy which it later developed was favored by 60 out of 75 Democratic members of the House. In his home in Wilson Judge Connor sensed that the influential opinion in the Legislature would be favorable to impeachment. He had been Speaker of the House when the position of Inspector of Shell Fish had been abolished. He believed no property right existed in the office. He placed the rights of the people above the rights of any official. Having voted to abolish the office, he believed White had no claim to it and, therefore, could be entitled to no compensation. He had followed the decisions of the Court with disapproval. He agreed with the position *Justices Clark* and *Montgomery* took in their dissenting opinions, but he disapproved *Clark's* statement which hinted at impeachment.

I recall talking with him during the Christmas holidays. He suggested, in the big brother attitude he always maintained toward me, that the *News and Observer* was making a mistake in predicting that the Legislature would impeach the judges. He thought it was making sentiment for that policy before the legislators could confer about the matter. In a matter touching the Court, he advised that the press ought not to print anything to add to the feeling against members of the Court, which the office-holding decisions had produced. In fact, in that as in other matters, he always held that the press was too quick to print what might occur in future trials. He often said to me that newspapers printed too many allegations about cases coming on to be heard. He declared they sometimes thus improperly influenced public opinion which was reflected in the jury box. He was never an editor and never could be convinced that if the newspaper waited for the orderly, and sometimes slow, processes of the court, it might as well go out of business—that it must be "a map of busy life" and print the news when it was news.

Generally, as to his doubts and trouble over the impeachment, however, he kept his own counsel. The day after Christmas in 1900, writing to his friend, Judge George Howard, with whom he carried on intimate correspondence for many years, and to whom he always unbosomed himself without reserve, Judge Connor wrote:

> "The talk of impeaching the judges is unfortunate. I cannot understand how they can justify their course, but we had better be patient. We have plenty of work to do without hunting up folks to punish."

Again writing to Judge Howard on 9 February, 1901, while the impeachment resolution was pending in the House, Judge Connor more fully and frankly stated his true position in these words:

> "Of course I am very much annoyed by the impeachment business. I am strongly impressed with the conviction that the Court was determined to nullify, as far as possible, the legislation of 1899,

> and that it resorted to many strange and subtle decrees to do so, but I do not think it wise to press the matter to impeachment. I am not one of those who think in dealing with practical affairs it is the duty or matter of principle to press every question to a final test. I am convinced that it was neither wise nor prudent to press the matter beyond a dignified protest."

Shortly after thus concisely giving to Judge Howard his attitude, condemning the judges and opposing praying judgment and the severest sentence, Judge Connor introduced the following substitute to the impeachment resolution in the House of Representatives:

> "Resolved, by the House of Representatives, the Senate concurring, That in issuing a mandamus to the State Auditor and the State Treasurer, in case of Theophilus White against Hal W. Ayer, State Auditor, and W. H. Worth, State Treasurer, lately pending before the Supreme Court, a majority therein concurring, assumed authority and power not conferred by the Constitution and laws of the State, but in derogation thereof."

Immediately another-to-be-learned Justice of the Supreme Court, Hon. William R. Allen, of Wayne, then member of the House and soon to be chairman of the Managers of the Impeachment, accepted Connor's statement of the illegal action of the judges, and moved to amend the substitute offered by Mr. Connor by adding the following, which he afterwards withdrew to support the committee's impeachment resolutions:

> "That said Judges, *David M. Furches,* formerly *Associate Justice,* and now *Chief Justice,* and *Robert M. Douglas,* an *Associate Justice* of the Supreme Court, be impeached for high crimes and misdemeanors in office."

The difference between Judge Connor and Judge Allen was not in condemnation of the act. The Connor resolution declared that the judges had acted "in derogation of the Constitution and the laws." He had no defense to make of their decisions. Judge Allen, and those who agreed with him, declared that if, as Connor stated, the judges had violated the Constitution, the penalty for such violation should be exacted. It was on this point that the battle royal was fought. The Republican members spread their protest on the Journal upholding and commending and defending the judges, and declaring they had not violated either the Constitution or the laws.

The Connor substitute was the sensation of the day. He was known to have been sorely disturbed, but until his resolution was flashed on the wires, the impression prevailed generally that the Democratic members were united for impeachment. Though on the vote on his substitute, Judge Connor could muster only twelve votes, beside his own, the fact that he opposed the severe penalty carried so much weight in the State at large that the advocates of impeachment for the first time doubted their ability to succeed. It soon became apparent the Connor substitute had been received with approval by many who believed in condemnation, but who followed him in this statement to Judge Howard: "I am not one of those who think in dealing with practical affairs it is the duty or matter of principle to press every question to a final test." As the years have passed, the wisdom of that expression is more and more manifest.

The debate in the House was heard with tense interest. The lobbies and galleries were crowded. The argument on the whole was upon a high plane. The preponderance of logic was with the advocates of impeachment, and they won by a vote of 62 to 33, not counting the pairs. It was a rather crushing defeat for Judge Connor. He so felt it, and regretted that his position brought about a coolness for a time between him and some of his closest friends. But he "could not do otherwise," though he believed the resentment of party leaders and party workers, who strongly condemned his course, would force his retirement from public life. No unhappier man walked the streets of Raleigh in those crucial days. Connor plunged into his legislative duties. Chairman of the committee on Education, he worked with zeal and diligence and leadership, but the sense of the loss of influence gave him hours of pain. However, this did not affect his faith in the righteousness of his course. He was "too fond of the right to pursue the expedient." His course coincided with the Emersonian rule: "What I must do is all that concerns me, not what people think. This rule, equally arduous in actual and intellectual life, may serve for the whole distinction between greatness and meanness." Whatever the consequences, if he must tread the wine press alone, he had the approval of his conscience. He could sleep with himself, untroubled. Beside this, nothing counts.

The impeachment trial began in the Senate on March sixth. Though there were five articles of impeachment, the last being an all-inclusive indictment of "the violation of the Constitution of North Carolina various times and in numerous decisions of said Court, commonly known as the office-holding cases," the gravamen of the charge against *Judges Furches* and *Douglas* was in these words:

> "That action of said Judges of the Supreme Court is hereby declared to be in violation of the spirit of the Constitution, and in defiance of the plain statutory law of this State, a usurpation of power subversive of the rights of the legislative department of the government."

Judge Connor in milder language had made a like condemnation in his substitute. He had even written an indictment quite as serious in his letter to Judge Howard in which he said he was "strongly impressed with the conviction that the Court was determined to nullify, as far as possible, the legislation of 1899," and in order to do so had "resorted to many strange and dangerous decrees." When the impeachment trial began, Judge Connor, his legislative duties of the session being over, went to his home in Wilson. Though holding himself aloof from taking sides while the Court of Impeachment was in session, he followed the trial with deepest interest.

I dare say that no tenser feeling ever permeated the Senate chamber than during the seventeen days consumed by the trial. The spacious chamber was crowded at every session. Perhaps some faint idea of the passionate partisanship manifested during the trial may be conveyed by a glance at the attitude of the wives of those active in this impeachment trial. Every day, just before the court convened, a score of well-dressed women entered the capitol. The wives of some of the lawyers of the respondents ascended to the Senate chamber on the western staircase and took their seats on the side reserved for the judges, their attorneys and friends. The wives of some of the managers and attorneys for the prosecution ascended by the opposite stairway and sat during the long sessions as partisans of their husbands on the side assigned to the prosecution of the judges. The women were intensely interested, perhaps as much from loyalty to their husbands as in the issue. The chasm for the time being affected the social life of the capital. Hosts were careful to keep in mind the acute situation created, for while the good women preserved outwardly every form of courtesy, both sides felt that there was a separation that could not be fully bridged. It was a camp of polite aloofness, not without some whispered conversation that showed how deep, even bitter, was the feeling in the opposing camps, alike of the women as well as the men.

It was more than a judicial trial. It could not be wholly divorced from politics. It had its origin in legislation ousting Democrats from office by the Fusion Legislature in 1895 and 1897, and in the counter legislation of 1899 to restore the exercise of the functions of a number of positions to members of the party whose representatives had been removed from office by the Fusionists. Democratic leaders gathered at the capital in full force. Republican politicians flocked to the city. The judges had the benefit of the active influence of the two giant corporations then powerful in the State. Their partisanship was attributed by some to the fact that in the presidential campaign of 1896 and 1900 the heads of these corporations had supported the Republican nominee for President, and that most Republican judges and leaders stood against any trust legislation or prosecution. The two morning daily papers in Raleigh were arrayed on opposite sides. The *Morning Post* approved the course taken by the judges and championed their cause, and was severely critical of *Justice Clark*. The *News and Observer* believed that, having violated the Constitution and the laws, the judges should not escape the penalty for such violations, advocated conviction upon the charges. The press in the State as a rule took sides. The politicians of both parties likewise were arrayed, all the Republicans for the judges' acquittal, and most of the Democrats for conviction. However, there was a large element which, influenced chiefly by the position of Judge Connor, more and more came to his way of thinking. Indeed, it may be truly said that it was the attitude of Judge Connor condemning the decisions and orders of the majority of the Court, but opposing severe punishment, which, in the last analysis, resulted in the acquittal of the judges, though on one count a majority of the Court, but not the two-thirds necessary for conviction, voted "Guilty." The failure to convict, if I may venture to give an opinion, was due to two things and two things alone:

1. The position taken by Judge Connor. Though he could muster only twelve votes in the House for his resolution to condemn but not to punish, it received approval by many thousands outside that body, raising up strong protests against an extreme penalty—this, too, in an era of partisan feeling when neither party was fully free from playing for party advantage.

2. The Fifth Article of Impeachment imputed corrupt intent to the judges. One Senator, who voted for conviction on four articles voted "Not Guilty" on the fifth, saying: "By the vote I have given I have not intended, nor do I wish to be understood as imputing to these respondents dishonesty or corruption in office in the sense of Lord Bacon's impeachment, taking a bribe. I cannot agree that the law is, as argued by counsel for the respondents, that before I can reach a conclusion upon this article I must find a corrupt intent. Why the managers deemed it necessary in the Fifth Article to allege a specific intent I do not see, and, as that is alleged in this article, I cannot concur in the position of the charge."

It is not meant to say that Judge Connor's modified resolution of condemnation of the decisions of the impeached judges and his earnest plea against impeachment for high crimes and misdemeanors alone secured the acquittal of the judges. In any event, there would probably not have been the two-thirds necessary to convict. It is not too much, however, to say that with the tide running strong in favor of conviction, his early protest against severity stemmed that tide, in fact turned it, and in the end created a sentiment that prevented conviction. One who followed the Court closely could not fail to sense the growing feeling, as the evidence and argument proceeded, that Judge Connor was right in declaring that the act of the judges was "in derogation of the Constitution and the laws of the State," and that "the Court was determined to nullify as far as possible the legislation of 1899, and that it resorted to many strange and subtle decrees to do so," but that there was lacking any such corrupt intent as to justify impeachment. In the popular mind, "high crimes and misdemeanors" imputed more than the partisan bias. The average man who sided with Judge Connor, and was influenced by his stand, could not make the distinction which lawyers made of the lack of personal corruption in "high crimes and misdemeanors."

The trial over, those who had stood for impeachment and conviction believed they had achieved a salutary result. They thought they had given pause to all judges when partisanship threatened to invade the court. They also believed the impeachment would avert what they feared, to wit, the possible Supreme Court decision that the suffrage amendment was unconstitutional. At that time the fear of such a decision sat upon the hearts of the leaders who had secured its adoption. Those who had opposed impeachment rejoiced in the verdict of "not guilty." They hailed acquittal as guaranteeing judicial independence and freedom from legislative and other influence. All unconsciously both sides felt that the Connor spirit had been present throughout and had largely influenced the final result. Often the man who stands between two contesting armies is crushed between them. The advocate of neutrality or mediation, when everybody is putting on the armor for a fight to the finish, is usually destroyed without benefit of clergy. Judge Connor's resolution of criticism was regarded as condemnation by the judges and their friends. Even so, they hailed it as a spar to keep them from drowning.

Both the sincere and the partisan advocates of impeachment had varying opinions. Some derided Connor, contending that he had given a verdict of "guilty," but refused to demand punishment. His resolution was variously called "an impotent gesture," a "straddle" or "courageous and wise declaration that met the exigencies." Partisan Democrats condemned him more and more as the trial progressed, and they saw that his position had made many converts. Some who had started out strong for impeachment came, as the trial went on, to the conclusion that there ought to be no verdict of "guilty." They were equally sure that acquittal and vindication did not fit the case. "How much better," they argued, "to put on record condemnation without asking removal from office in disgrace?"

These varied views of his position did not escape Judge Connor. He had keenly felt the criticism of such warm friends as Allen and Craig, and Rountree and Graham, to name only four leaders. He believed that most active Democrats shared their views. He did not doubt that their disapproval would injure his party influence. This reflection gave him pause and regret. He voiced it to a few intimates. I might quote my recollections of what he said in this time of depression (all men who follow convictions which separate them from associates have that feeling at times, even if they conceal it), but it is better to recall his own words in the letter which he wrote to Judge Howard after the end of the impeachment trial. "I think the impeachment trial terminated very satisfactorily to the large majority of the people of the State" and in the following sentence he disclosed his conviction that the estrangement created by his disagreement with most party associates would be destructive of any political ambitions he might entertain: "I am content to retire from public life."

North Carolina people were bigger than he then appraised them. After the smoke of battle cleared away, the realization came on the part of all that Judge Connor had acted upon his sincere conviction at a time when he believed such action would be injurious to any desire for future promotion. Instead of its operating against him, many of those who had been most zealous for impeachment held him in even higher esteem. There is deep down in the hearts of men an admiration for any honest man who follows his conscience, who has in him something of the spirit of Luther. Many, sensing the partisanship of the court which led it to invent devious ways to throw Democrats out of office and protect Republicans in office, saw that the wiser course was the one proposed in the Connor substitute. Therefore, he lost no standing in his party, as was evidenced when in 1902 he was nominated by the Democratic party as Associate Justice of the Supreme Court. This honor was grateful to him. He had long cherished an ambition to serve on this Court. Indeed at one time he hoped to be Chief Justice and missed it by the narrowest margin. Writing on 3 January, 1901, he said: "If *Judge Faircloth* had lived twenty days longer, I have every reason to think that the aspiration of my life would have been realized." It is most probable that Governor Aycock would have named Connor to succeed *Faircloth* if the appointment had come to him.

It is significant that his main supporters for elevation to the bench in the close contest with an able and popular opponent, Judge George H. Brown, who was later to grace the Supreme Court bench, were the Managers for Impeachment on the part of the House. This was also true of others who had been in the early stages most critical of his moderate course of action. That fact is the best tribute to the sense of justice and admiration of courage that is the highest attribute of our humanity. If the impeachment trial, or Judge Connor's part, entered at all into that hard-fought contest, it was so small an influence as to be negligible. In fact, within a few weeks after the termination of the trial, it was a closed incident. Just as Connor's opposition to impeachment was no bar to his elevation to this bench, just so a few years later, when Hon. William R. Allen, Manager in the Impeachment trial, who added lustre to the Supreme Court by his all too short service on this bench, was a candidate for Justice, his advocacy of impeachment did not affect the result in the least. The same is to be noted in the case of *Justice Walter Clark,* who was credited by *Judges Furches* and *Douglas,* and by many others, with inspiring the impeachment of his colleagues, and who had for this cause been assailed more bitterly than Judge Connor. When he became a candidate for Chief Justice, no appreciable opposition was due to his dissenting opinions or his opposition to the majority of the Court in the office-holding decisions or to the advocacy of impeachment.

The storm had raged violently. Then there was a great calm. Asperities and bitterness were not only forgiven; they were forgotten. They disappeared as if they had never shaken the capital.

The record of Judge Connor as Associate Justice of the Supreme Court, covering six years, is found in the volumes of North Carolina Reports and is fresh in the recollection of the people. He brought to this Court a high ideal of duty, knowledge of the law, sincere worship of equity, freedom from slavery to precedent, and a passionate desire to interpret the law as something vital and beneficent in the expanding humanities and industries of the commonwealth. By his votes in conference and his written opinions, he lived up to his exalted conception of the duty of a jurist. Always governed by a strict sense of propriety and ever mindful of the circumspection imposed by his high calling, Judge Connor refrained from active participation in public affairs during his judicial terms. However, he never allowed his life to lapse into the past, and always held firm convictions on public questions, stating his views forcibly upon proper occasion. Although a man of vigorous opinions, his views were so free from bitterness that he never engendered resentment in others.

Above everything else his opinions breathed his great regard for the rights of the citizen, his life and liberty as well as his property. He was never more stirred at what he thought was error than when the Court in the appeal of *S. v. Lilliston* (141 N. C., 857) denied the motion for a new trial upon newly discovered evidence, as well as upon other points. He wrote probably the most vigorous of all his dissenting opinions, in which he said:

> "I have never been able to understand why, if this Court has the power to grant a new trial for newly discovered evidence in a case involving property of ever so small a value, it has not like power where the liberty and life of the citizen is involved. I have

> read with great care all that has been said upon this subject. The force of the argument which deprives us of power to grant this relief, to my mind, applies with equal force against our power to grant it in a civil action. It is one of those questions, which to my mind, will only be settled when reasons more cogent than any yet advanced are found to sustain the conclusions of the Court. The argument *ab inconvenienti* does not impress me. When life and liberty are outstanding, I cannot conceive the force of this argument."

His natural tendency to equitable principles gleam through his opinions in the Supreme Court Reports. Indeed he was peculiarly interested in equity. In every case possible he insisted upon equitable relief.

Just as it fell to his lot as Associate Justice to reverse *Hoke v. Henderson,* so he was called to write an opinion upholding "the Connor Act," the passage of which he had secured as State Senator in 1885. In the case of *Collins v. Davis* (132 N. C., 106) he dealt with the act bearing his name. He held that no notice, however full, can take the place of the registration. This perfected titles by registration.

It was not only in his decisions that Judge Connor showed his belief that law was neither static nor a procrustean bed. He did not believe that man should be trimmed to fit the laws of yesterday, but that statutes should be framed to protect the rights of man. As has been seen, conservative toward change as he was, he did not hesitate to overrule decisions which he believed were founded on wrong principles or erroneous precedents or when new conditions demanded changed interpretations. In legislative halls, in public addresses, in private letters and in suggestions to legislators he set out the needed judicial and legislative reforms. He believed in the election of judges by the people and said such methods of selection "upon the whole secured better results than either executive appointments or legislative elections," and in proof of his position said, "Since 1876, with few exceptions, we have secured a representative judiciary." He held that opinion in 1912, after he had gone on the Federal bench by presidential appointment. In a long letter to Judge Whitfield, Judge of the Supreme Court of Florida—a relative of his wife—Judge Connor went at length into his well considered conclusions as to judicial reforms. "I believe it should be possible and practicable," he wrote, "to adopt Codes of Procedure simple in their provisions, prompt and efficient in their results, with very much less expense to litigants than those which we now have both in State and Federal practice." And he added: "We have not done our duty in chopping off the dead limbs and permitting fresh growth." Writing again of his conceptions:

> "Technicalities—like the fictions have been useful in primitive conditions—are scaffolds which were necessary in the process of building, and should drop off when they have served their purpose, but should not be rudely torn down by ignorant iconoclasts lest they leave the last state worse than the first. The lawyer must ever keep in mind the truth that the jurisprudence of a people is a growth, development, and not a thing to be manufactured, patented and labeled as perfect. Growth is essential to purity."

In 1912, in a personal letter to Dr. Dred Peacock, son of an old friend, upon receiving his license to practice law, Judge Connor gave expression to views he had long held and discussed with his associates:

> "The cunning and curious learning of the old common-law lawyers in regard to contingent remainders, executory devises, the rule in *Shelley's case,* etc., etc., is antiquated. All entails should be prohibited and the method of conveyancing and recording deeds should be made simple and cheap. There is abundant room for the work of the intelligent reformer, but he should be profoundly learned in the reason and writing of the law before he is permitted to undertake to reform the law as it is. More than half the reformers need to be reformed."

The office-holding cases, which were the occasion of the impeachment trial, were to follow Judge Connor on the bench of this Court. Not long after qualifying as Associate Justice of the Supreme Court of North Carolina, a case came up in which the much disputed decision in *Hoke v. Henderson* was invoked. This was *Mial v. Ellington,* heard on appeal from Wake County Superior Court, at August Term, 1903. When a private citizen Judge Connor had expressed to friends his disbelief in that doctrine. During the impeachment trial he was even more convinced that it, like its prototype, the *Dartmouth College case,* was contrary to the spirit of the Republic. It was, therefore, gratifying to him to be on the bench when that doctrine was overruled, and it was forever settled in North Carolina that no officeholder has property rights in a public position. *Judge Connor's* opinion in *Mial v. Ellington,* 134 N. C., 414, reversing *Hoke v. Henderson,* is justly regarded by the lawyers of the State as one of the great opinions of our Supreme Court. It is to be noted that both *Douglas* and *Montgomery* dissented. If opinions were still being influenced by party, this time three Democrats ruled and the two Republicans stood for the old position which had precipitated impeachment.

He was gratified that the reversal of a court opinion, long followed if not respected, which had created a crisis in the State, should have been received with such approval. Writing to Judge Howard (21 December, 1903), Judge Connor said: "The decision in regard to *Hoke v. Henderson* has received well nigh the unanimous endorsement of the bar. I was surprised to see how uniform was the current of authority and thought upon the question."

Conservative to the extreme in preserving rights and liberties embedded in the statutes and decisions, it was only when they protected privileges, immunities or exemptions that he took genuine pleasure—indeed it gave him a thrill—in restoring to all the people what had been enjoyed by a class. He thus illustrated Tennyson's perfect picture of the true conservative. He was fond of quoting these lines from the poet:

> "May freedom's oak forever live,
> With stronger life from day to day.
> That man's the best Conservative
> Who lops the moulder'd branch away."

Instead, as has been shown, of Judge Connor's opposition to impeachment standing in the way of preferment to judicial honors in North Carolina, the time was to come, during his distinguished service as Supreme Court Justice, that his independent action was to secure for him national recognition. In 1909 a vacancy in the Federal Judgeship of the Eastern District of North Carolina was to be filled. Nearly every Republican lawyer in the district was a candidate. There was a contest for endorsements. In addition, there were charges and counter charges as to some of the candidates, which so disgusted President Taft that he determined to name none of the avowed candidates, but go outside his party and find the fittest lawyer in North Carolina for the position. No President has been more solicitous to preserve the high standing of judicial appointments than Mr. Taft. It was—it is—a passion with him. I recall a question he asked me in Washington after he had been made Chief Justice. Speaking of the gratification Judge Connor's course had given him, Mr. Taft said: "Have you followed my appointments to the bench in the South?" I told him that I had kept up with them only in a general way, but with gratification. With a characteristic chuckle, he then detailed how he had refused to permit politics to govern his judicial appointments, having regard only to making the Federal bench deserve the confidence of the people of the South. This led him to ignore party lines. He had made White, a Confederate soldier and a Democrat, Chief Justice of the United States, and he had selected other Southern Democrats. Looking about to lift the appointment above politics, he scanned the record of North Carolina jurists. The record of Judge Connor appealed to him. He learned that in 1894 the Republican party in North Carolina had, without his knowledge, tendered the nomination to Judge Connor as Associate Justice, thus testifying to its confidence in him. President Taft read the record of the impeachment of two Republican Supreme Court Judges. Naturally he was informed by party associates that they were not guilty and was told that they were the victims of partisan politics. He read some of the opinions written by Judge Connor. It was said at the time that, among the opinions of Judge Connor which most favorably impressed President Taft was one which illustrated his attitude towards the protection of property rights. This was in the case of *Daniels v. Homer* (135 N. C., 219). He dissented in one of his ablest opinions, and it was commented upon in various legal magazines throughout the country. The property involved was infinitessimal in value. He was interested in the right of the citizen to have the question as to whether or not he was using property in violation of law passed upon by a court before it could be destroyed by a ministerial officer—the right to be heard before judgment was announced. He said: "I cannot assent to the validity of any legislative enactment depriving the citizen of his life, liberty or property which will not stand the test of the standard prescribed by the Constitution." The same question was presented in *S. v. Jones.* He vigorously contested the right of a town by legislative enactment to condemn a man's property for streets without notice from the inception of the condemnation proceedings. All that President Taft learned about Judge Connor made such an impression on him that he resolved to ask him to accept the position of Judge of the Eastern District of North Carolina. By neither word nor gesture had Judge Connor indicated a desire for the appointment. No friend, by his request or knowledge, turned a hand to secure him the proffer of the judgeship. It came to him unsolicited (to the objection of most Republican political leaders in the State), but to the satisfaction alike of broad-gauged Republicans and Democrats. When he wrote Judge Howard in 1901 that "I am content to retire from public life," he little thought his leadership against impeachment would be no deterrent to his elevation to the Supreme Court of his State or prove the stepping-stone to his elevation to the Federal bench, where he was to lift the Federal courts to a plane they had not hitherto, since the War Between the States, occupied in this and other Southern States. It was no promotion to him from the Supreme bench of the State to the Federal District bench. It carried, however, the imprimatur of national recognition, increased compensation and guarantee of retirement pay. These appealed to Judge Connor, for he had never accumulated even a competence and was dependent upon his judicial salary. Already passed fifty, with no financial provision for old age, he was happy to make the exchange. There was another and a more compelling reason. From 1865 up to 1909 the Federal Courts in the South had been regarded as alien. The earlier appointments after the war of the sixties had often gone to men of Northern birth, coming South and taking part in reconstruction politics. When Southern-bred men had been appointed, they were too often politicians, sometimes without the requisite learning, sometime without high character and public confidence. During and following reconstruction some of their courts were openly partisan and some judges lent themselves to what the dominant Southern sentiment believed was judicial or near judicial persecution. There were notable exceptions, but even then, as in the case of Judge Seymour, who grew into the esteem of the bar, the courts were everywhere regarded as alien even when not inimical to Southern policies and views. Devoted alike to his profession and to his State and to the reunited Republic, Judge Connor saw in the tender of the Federal Judgeship an opportunity to bring the Federal Courts into the same relationship in their sphere as the State courts occupied in their jurisdiction. He had long deplored the lack of confidence in the Federal courts and had felt that their influence was weakened because of their alien sympathies, or the belief that they lacked touch with the people of the South. It was with the desire to restore the Federal courts in the confidence of the people that he responded to the call to transfer his judicial labors from this Court to the courts set up by the Washington government. The presence of a home Democrat of marked ability on the Federal bench in Eastern North Carolina was a sight so strange that, for the first time, many citizens visited the courtroom to witness the transformation. They soon realized that there was nothing inherent in Federal courts that was alien. On the contrary they found no difference whatever except as to the character of litigation. Justice was dispensed with mercy—some thought the Judge leaned too much to mercy as he grew mellow after he passed three-score. The bar and the public sensed a new atmosphere. Taking frequent occasion in his charges to grand juries and at other times to explain the Federal courts, Judge Connor lived to see the court over which he presided regarded by the people it served as being their tribunal and one to which they might appeal with a sense of complete confidence and from which they might expect only justice. He did not follow the custom of other Federal Judges in this State of wearing a robe upon the bench, and conducted his courts with a freedom from formality in keeping with the simplicity of his private life. Without the aid of any frills or furbelows his courts had an impressive air of dignity imparted by the personality of the presiding judge. Courts over which he presided never suffered from lack of respect nor was it ever necessary for resort to any artifice to secure respect. He never found occasion to cite any person for contempt of his court. By his spirit and manner, added to his ability and fairness, a revolution in public sentiment as to Federal courts in this State was wrought so silently as not to be apprehended. If a tablet shall be placed to his memory in the Federal Court over which he presided, to commemorate his service, it should read:

"IN MEMORY OF
HENRY GROVES CONNOR.
HE RESTORED RESPECT AND CONFIDENCE TO THE
FEDERAL BENCH IN NORTH CAROLINA."

If there had been no impeachment trial, if Judge Connor had not stood for mercy and moderation, if President Taft had not entertained loftiest ideals which made him elevate the bench above politics, the day of the rightful place of the Federal courts in North Carolina's estimation would not have been witnessed by this generation.

There are three standards by which a man is measured. The first, and one usually accepted, is the estimate of those near to him in boyhood and youth. "The boy is father to the man" is generally accepted. Therefore sayings and doings related of early life are woven into his life story as the best indication of what he is to be. How did he bear himself in his home? With his intimates? In his daily contacts? The answer to those questions determine for most biographers the inner soul and real spirit of the man. It is not unerring. Courtesy to those near calls for some repression of the natural self, and intimates do not always see beneath the surface. Incidents related by associates do not always give the true insight into the man, though they illustrate and satisfy natural curiosity. Sometimes the modern Boswell confounds his own views with the observations of his hero.

Is there not a better standard? If a man is given to introspection, if he puts his thoughts and feelings on paper, the real man is more truly seen than in the stories about his precocity or the recollections, often faulty, of those related to him by ties of blood or companionship. It sometimes happens that they know only the side disclosed in the home. This is particularly true with one who, like Judge Connor, had great reserve. Knowing him from early boyhood, enjoying his friendship and confidence for half a century, it seems clear to me that he often disclosed his philosophy of life more fully in his letters, particularly to those of common aspirations, than to those nearest to him. If you would know the Judge Connor, whose memory we honor today, you will find him analyzed quite as truly in his addresses and letters as in personal intercourse, though there is, of course, lacking in the written word the personal charm which attracts and holds.

The public knew him as lawyer, legislator, judge. He was also a man of letters and fortunately he has bequeathed biographies and addresses. These would give him a high place if he had no other claim to distinction. All that he wrote, too, was in the leisure hours which he snatched from his arduous professional and public labors. In his historical contribution upon the State Constitutional Conventions he traces the movements of the tides of the State's development as found in its fundamental charts. He was all the more qualified to write of changes in the Constitution because of his own part in amending the State Constitution, as well as his knowledge of how the fathers dealt with its growth and expansion.

He mastered a style that was his own, and he never fell into the mistake of thinking he must write down to his readers. His style was like the man, more argumentative than declarative, reaching its height in measuring everything by the common denominator of righteousness. Thus in his legal opinions as in his addresses to young men and his historical and biographical writings, "he had great intellectual generosity, power to entertain truth and to see new relations of things." He was remarkably felicitous in strengthening his utterances by authoritative quotations, as he loved to support his judicial opinions by reference to declarations by the great of the earth. These quotations indicate his choice of reading. He chose the mental and more aristocratic of law and letters as his models, and imperceptibly was influenced by their style as by their wisdom. He did not go afield for them, but drew upon and they dropped in their proper place as an essential part of a mosaic. Always in what he wrote, as in his conversation and his addresses, there was revealed a mind as one with lofty thoughts. James Bryce might truly have used of him the words Judge Connor quoted as applying to another:

> "As dignity is one of the rarest qualities in literature, so elevation is one of the rarest in oratory. It is a quality easier to feel than to describe or analyze. One may call it a power of ennobling ordinary things or showing their relation to great things, of pouring high emotions around them, of bringing the worthier motives of human conduct to bear upon them, of touching them with the light of poetry."

In addition to other writings and biographies, notably his Life of John A. Campbell, Associate Justice of the United States Supreme Court, five of his addresses on eminent lawyers would make a volume covering the lives and achievements of illustrious members of the bar during the most important periods in the history of our commonwealth. These five lawyers he portrayed are stars of the first magnitude in our firmament, more firmly fixed by his appraisement—James Iredell, William Gaston, George Davis, George Howard, William T. Dortch. It was such exalted men, and such only, whose virtues appealed strongly enough to him to evoke his discriminating appreciation. No higher tribute could be paid to Henry Groves Connor than to say that he was worthy of a niche with that illustrious quintette, to whom he was akin by learning and by statesmanship and character. No man can write biography, long or short, without putting himself in it. It was Howard to whom Connor was most affectionately attached, to whom he gave his fullest confidence, and to whom he looked most confidently for counsel. He had friendship and admiration for his preceptor, Mr. Dortch. He was intrigued and held by Iredell's great ability. He had genuine admiration for George Davis as this tribute shows: "North Carolina never bred a finer gentleman, nor one who more completely commanded the love and reverence of all who knew him." But Connor reaches new heights when he writes of Gaston. He was his ideal. His career inspired him as did that of no other North Carolina lawyer. So much so that he seems constrained in his portraiture, fearing to give full reign to his almost adoration. Because his head and heart commanded the highest tributes his hand could pen, he seemed to fear exaggeration of statement. Running as a thread through much that he wrote is such admiration of Gaston the lawyer, Gaston the judge, Gaston the statesman, Gaston the man, Gaston the Christian, that Judge Connor discloses in many ways that of all the men who lived in this State, Gaston most fully filled his idea of the highest conception of a great and good man. He could not have honored Gaston so much if this patron saint had not measured up to the high qualities Judge Connor had fixed for himself. He was fond of talking of Gaston, of quoting from him, particularly the following admonition of Gaston in the Constitutional Convention of 1835: "Make it right so it may last." Judge Connor made that admonition his rule of action in public and private life. He also quoted with approval another maxim by Gaston in the same Convention: "If righteousness exalteth a nation, moral and religious culture should sustain and cherish it." His appreciation of Gaston reached high water mark in his estimate in Gaston's memorable Commencement Address in Chapel Hill in 1832. In a day when discussion of the policy of slavery was regarded by many as unfriendly criticism of the South, Gaston told the young graduates and the State that "it is slavery more than other causes that keeps us back in the career of improvement." He added this indictment of the peculiar institution: "It stifles industry and represses enterprise, it is fatal to economy and providence, it discourages skill, it imperils our strength as a community and poisons morals at the fountain head." Those courageous words, taken in connection with the sensitiveness of the predominant public sentiment, were regarded by Judge Connor as proof that his exemplar was a prophet who dared to sacrifice popularity to tell his countrymen the truth. More than once Judge Connor demonstrated like bravery. Was it inborn? Or, did Gaston's example incite him? Certainly he entertained the views in 1913 to which Gaston gave expression in 1832, for in a private letter to a friend, Judge Connor wrote:

> "The truth is slavery was like a cancer on the body and could only be cut out by going very close to the vitals. I am glad that it was done before my day as, with my convictions, I would probably have been compelled to seek a home where there was no slavery. I could never have lived in a slavery community with my convictions. With this intense feeling on that subject, I am equally intense in my feeling that, as an exercise of reserved sovereignty, the State of North Carolina had a right to withdraw from the Union."

There is a third criterion that discloses the aspirations and standards better than personal contact or letters or speeches. It is to ask of the man under discussion: Who were his heroes? What sort of man did he hold up to himself as a model? Herein you have the true measure of the man's very self. Given the characters the man regards most highly, or the biographers he finds most satisfying, and you understand the man, sometimes better than his closest friends or his correspondents from whom he withholds no confidence. Outside Judge Connor's personal associates—and he numbered choice spirits among his intimates and attached them to him with hooks of steel—who were the world figures who did most to stimulate him? In the field of statesmanship, William E. Gladstone was regarded by him as nearest perfection, as was Phillips Brooks in the spiritual world. He read the latter's sermons religiously and assimilated them. "O that we had a Phillips Brooks in every parish!" he once wrote. In a letter to Judge Howard in December, 1903, Judge Connor said:

> "I have today been reading Morley's Life of Gladstone. What a splendid, moral, spiritual and physical type of man he was! Morley says Gladstone thought of the church as the soul of the State; he believed the attainment by the magistrates of the ends of government to depend upon religion; and he was sure that the strength of a State corresponds with the religious strength and soundness of the community of which the State is the civil organ. He said when a

> young man: 'I am willing to persuade myself that in spite of other longings which I often feel, my heart is prepared to yield other hopes and other desires for this, of being permitted to be the humblest of those who may be commissioned to set before the eyes of man, still great even in his ruins, the magnificence and the glory of the Christian truth.' "

Judge Connor's admiration of Gladstone was largely due to their common belief in the Christian religion and in liberalism that kept itself free from radicalism. It was, however, heightened greatly by the magnificent historic fight Gladstone made for Ireland. The cause of Ireland was close to Judge Connor's heart, partly because of the Irish blood in his veins and partly because of his innate belief that no people were wise enough or good enough to govern other people. The first kindled his enthusiasm. The second appealed to his seasoned faith in the doctrine defined by Wilson as "self-determination." He believed in it for Ireland, the home of his forbears, as he believed in it for England and America. When he talked with friends of the Gladstonian policy of home rule there was enthusiasm and sympathy for his own race which shone above the principle involved. Blood will tell.

In his career as legislator, he doubtless often asked himself, "What would Gladstone do under those circumstances?" If he didn't ask that question and let his course be governed by his conception of what the answer would be, undoubtedly, all unconsciously Gladstone helped to determine his actions.

There is still another measurement of an introspective man. What did he think of himself? Few men, even with judicial minds, can justly appraise their lives and pass in judgment upon themselves. We are admonished not to think of ourselves more highly than we ought. It was a lifetime habit of Judge Connor to weigh men and measures, to X-ray his own motives and hopes, and in periods of depression to undervalue his contributions and usefulness. Among his papers was found an unsigned page, typewritten, evidently a putting on paper his self-appraisement. That paper reads:

> "On Thanksgiving Day, 27 November, 1919, I was in Raleigh and dined with a gentleman who interested me very greatly. My only reason for doing so was that I had no other invitation. He was, as it happened, just my age. He was not especially interesting in conversation and regarded by many of his friends as rather boring. While his friends think him vain and conceited, I am quite sure that, to some extent at least, they are mistaken. He has a sufficiently good opinion of himself, but is not conceited. The truth is that while young he was quite "cock sure" of the correct-

> ness of his opinions, but experience and association with men of sense has taught him that in many of his conclusions he was in error and, at 67, is far from certain about anything. A long experience at the bar and on the bench, in which he has met many defeats and committed many errors, has made him much of a doubter. He has read somewhat, but has not digested well what he has read. He is given to talking over much, but on this day he was very quiet—in fact he talked not at all. His dinner was very simple and he ate sparingly—chicken liver and gizzard, rice and gravy—followed by a cup of custard, constituting his menu. He is thought by his friends to have many fads and his family, who know him best, regard him as approaching his dotage. His fads and fancies are very harmless. He is free from dislikes or prejudices in regard to people and kindly disposed to his fellowmen. His trials and troubles, of which he has had many, have not made him pessimistic, but he is inclined to think the present conditions following the World War unsatisfactory and looks to the future with apprehension. He is fond of his friends and enjoys their association, but dislikes crowds, and avoids strangers. He is withal a fairly well conditioned man of his age. Health in fairly good condition."

Like all ambitious men, given to severe self-examination and absorption in books and in professional service, Judge Connor had his seasons of depression. In such periods he felt the need of friendly sympathy. He turned to Judge Howard for never failing understanding, and sometimes to other friends to whom he could voice his yearnings. Writing to Judge Howard on 16 May, 1892, he said:

> "It seems to me that as I go along my mistakes stand like armed obstructions to my progress, and which way soever I turn they confront me. They go to bed with me and they are with me in the night season; they greet me in the morning and dog my steps at noonday. They make the past unpleasant to look back upon and the future uncertain. My life has always been haunted by the spectre of ultimate failure. It has been the history of all to whom I have been related. No one can ever know what a burden it has been to me or how much it has weakened my endeavors."

In the next sentence he disclosed how friendships lifted him to his normal self, for he added: "My friends have been a source of complete pleasure and strength." His life shows how mistaken he was in saying that reflection of "mistakes" and "burdens" had "weakened" his "endeavors." No man fully understands himself. Judge Connor's record shows that, after periods of depression, he emerged with new confidence and new courage. When he wrote of his fears, or committed them to his intimates, the very giving expression to them operated in releasing him from their power, so that he was able to act in the spirit of the poet:

"That men may rise on stepping-stones
Of their dead selves to higher things."

These words of Judge Connor show how he rose out of depression into strength:

> "It is moral courage which sustains a man in the hour of disaster and defeat, which gives dignity to his character and commands the respect of all good men. It makes men afraid to do wrong and unafraid to do right."

Religion, reverent faith, was the rock upon which he rested. No depression, no anxiety, no bereavement, no travail of spirit (and all these came to him in periods of his life in larger measure than seemed his share) nor the more dangerous seasons of success and victory which blessed his life, drove him into loss of faith in God. Reserved in speaking of his experience, he illustrated his faith by his walk and conversation.

In a letter written to Judge Howard on 7 January, 1896, he reveals his belief that it is not in acceptance of creeds, but experience that unites Christian men, his disapproval of ecclesiastical pomp, and the danger to his own church (Protestant Episcopal, of which he was long a consistent communicant) from sacerdotal system:

> "On Sunday I dropped a little into the 'Confession of St. Augustine.' It is very interesting as setting forth the mental and spiritual experience of a sincere man. Part of it reminds one of the experience of a Primitive Baptist. After all there is much sameness in the experience of men, although they may adopt different formulæ for the expression of their feelings. I read with interest last night an account of the elaborate and magnificent ritualism, with which Sattali was made a Cardinal in Baltimore on Sunday. To me it was the merest show and tinsel—self-glorification and man worship—and yet millions of humble, devout Christian men and women find solace and strength in it and would go to the stake, as Sir Thomas Moore did to the block, to testify their devotion to it. Again this same ecclesiasticism which produces and sustains this pageantry and pomp today sends more missionaries, with the spirit of the martyr and monks, than our Protestantism with its more spiritual, and, I think, more orthodox conception of Christ and His

> Kingdom. That an old man in Rome, with no temporal power, can by the office which he holds, command the loyal allegiance of thousands and hundreds of thousands of learned, wise, and so far as we can see, devout men all over the world, is a mystery. I cannot comprehend it—it impresses me only as a study. Men are singular animals and more singular in respect to their spiritual natures. I do not believe at all in what is called a sacramental system, and yet I am inclined to think that it is the basis and the sole basis upon which organic Christianity can be permanently maintained. I am quite sure the Episcopal Church will ultimately drift into it. As the basis for personal religion, I think it is degrading and destitute of real communion with God; it brings in the priest between a man and his Savior—and this, of course, I reject strongly. These and many others are grave problems. We can think of them humbly and pray for light."

Would you understand the mainspring of the life of this learned lawyer, just judge, wise legislator, sincere patriot and friend of his fellowmen? Perhaps in none of his expressions did he sum up his belief that virtues bring forth fruit after their kind and that citizenship and useful service are based upon Christianity than in this philosophy of life which he gave to young men:

> "The highest and best standard of citizenship is always measured by faith in God and man. I have no confidence in the political purity and welfare of a community that is not based upon Christian manhood. You need not talk to me about a man's having faith in man who has no faith in God. It cannot be."

Here was his faith. His life rested upon it. Broad, tolerant, able, he moved through life, a clear-eyed man in a busy world.

"So," he said, "it has been given to us to carry the light of Christian civilization, where, I do not know, but wheresoever His hand points and guides and directs it is our duty to go."

He held to that duty. He carried that torch until his hand fell forever. And he handed it on undimmed to us who follow. This example of his life should give us zeal to carry it on.

His end was as his life—it came quietly. He felt its coming. Like a Christian philosopher he regarded it as no enemy, but as the last friend opening the portals to a new existence when physical powers in this life waned. He found death "a haven and a rest after long navigation," for "the noble soul is like a good mariner for he, when he draws near the port, lowers his sails and enters it softly with gentle steerage; for, in such a death there is no grief, nor any bitterness."

May it please your honors, I am privileged in the name of his family to present the portrait of Judge Connor to this Court on which he served with distinction, and to this reborn old commonwealth which his statesmanship helped to awaken to a higher destiny. The portrait is the creation of a gifted artist, Mrs. Mary Arnold Nash, of Chapel Hill. She has transferred to canvas the noble countenance that betokened a noble soul. As succeeding generations look upon it, read his opinions, and contemplate his inspiring career, they will be stimulated by his high emprise and honorable example. Thus he will abide with us to bless the State that loved to do him honor.

REMARKS OF CHIEF JUSTICE STACY, UPON ACCEPTING PORTRAIT OF FORMER ASSOCIATE JUSTICE HENRY GROVES CONNOR, IN THE SUPREME COURT ROOM, 19 FEBRUARY, 1929

The Court is pleased to have this portrait of former *Associate Justice Henry G. Connor,* and it has heard with gratification the thoughtful and discriminating address on his life and character.

His opinions are to be found in nineteen volumes of our published Reports, beginning with the 132d and ending with the 150th. They reveal a quality of mind, peculiarly his own, and a heart which beat in unison with the throbbing impulses of a great State, ever struggling for a fuller and freer life.

He was a living embodiment of the aphorism:

> "There is nothing so kingly as kindness,
> And nothing so royal as truth."

The lives of many have been enriched by the rare charm of his friendship, and in the memory of those who knew him best, the gentleness of his spirit still abides. Strong in action, loyal to his purposes, upright of life, he wrought nobly and well; and the State is immeasurably richer for his having lived and labored in it.

The Marshal will cause the portrait to be hung in its appropriate place on the walls of this Chamber, and these proceedings will be published in the forthcoming volume of our Reports.

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a Adultery

1. The provisions of C. S., 4225, making it a felony for any male person to abduct or elope with the wife of another, has as an essential element adultery after the elopement. *S. v. Ashe*, 387.

B Evidence of Abduction.

a Circumstantial Evidence

1. In a prosecution under C. S., 4225, for the abduction of another's wife, the necessary element of adultery may be shown by circumstantial evidence which satisfies the jury of the defendant's guilt beyond a reasonable doubt. *S. v. Ashe*, 387.

d Weight and Sufficiency

1. Evidence tending to show that the defendant charged with the violation of C. S., 4225, knew of the whereabouts of the wife of another after she had left her husband, and that they had dined together at a house of ill fame, and that they had shut themselves in a room thereof is competent upon the question of the abduction and of their immoral relations and a circumstance to be submitted to the jury. *S. v. Ashe*, 387.

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c Instructions

1. Where the evidence upon the trial of one charged with violating C. S., 4225, is that the defendant and the married woman met in a bad house, it is not prejudicial or reversible error for the judge in the statement of facts in his instructions to call it a "bad" house, or "house of ill fame," where this was not brought to his attention at the time. *S. v. Ashe*, 387.

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a Acquisition of Rights by Prescription in General

1. Upon failure to show possession adverse to plaintiff, who holds the paper title, it will be presumed that the defendant holds under the plaintiff's title. *Power Co. v. Taylor*, 55.

c Actual Possession

1. Evidence of casual fishing in nonnavigable waters from time to time does not alone amount to such adverse possession of the lands covered by the water as will ripen title against the one showing a perfect chain of paper title thereto. *Power Co. v. Taylor*, 55.

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1. Where the probate of a deed to lands is fatally defective it is not color of title against the grantor in a later registered deed, under sufficient probate, from a common grantee; but where there is evidence that title to the lands had been acquired under twenty years adverse possession this question should be submitted to the jury. C. S., 430. *McClure v. Crow*, 657.

C Pleading, Evidence, Trial, and Review.

a Burden of Proof

1. The burden is on the claimant to show adverse possession when relied on by him. *Power Co. v. Taylor*, 55.

b Evidence

1. Where the defendant relies upon his open, continuous, and adverse possession of timber lands for twenty years or more to establish his title, and not upon color of title, it is not error for the trial court to admit in evidence his deed to the land from the one under whom he claims as a circumstance in connection with the other and sufficient evidence, and when the evidence is conflicting the issue is for the jury to determine. *Tilgham v. Hancock*, 780.

D Acquisition of Prescriptive Rights by Municipal Corporations.

a Acquisition against Railroads

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tion of an original condemnation by the city under its charter or general statute, and just compensation paid therefor, and C. S., 434, relating to the acquisition of railroad rights of way by adverse possession in certain instances, has no application as to the rights of municipalities to acquire the land. *In the Matter of Assessment against R. R.*, 756.

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1. The jurisdiction of the Supreme Court on appeal is confined to matters of law or legal inference, properly presented, appearing in the record. Const., Art. IV, sec. 8. *Goss v. Williams*, 213.

b Motion for New Parties in Supreme Court

1. A motion to make new parties so as to change the character of the action, when made for the first time in the Supreme Court, will be denied. *Distributing Co. v. Carraway*, 58.

c Right to Appeal upon Overruling Demurrer

1. Upon the overruling of a demurrer to the sufficiency of the complaint in alleging a cause of action, an appeal to the Supreme Court immediately lies. *Goins v. Sargent*, 478.

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1. Sufficient facts should appear in the record to allow the Supreme Court to properly pass on the questions of law presented. *In re Estate of Prudden*, 69.

b Matters Not Set Out in Record Deemed Without Error

1. On appeal, the presumption of law is in favor of the correctness of the charge given below when it is not contained in the record. *Boswell v. Tabor*, 196; *S. v. Gooding*, 710.

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2. Matters not set out in the record will be deemed to be without error on appeal. *Jones v. Candler*, 382.

3. For a reversal on appeal the appellant must show error, and where the record is silent as to evidence upon which the Superior Court judge has reversed the report of a referee the presumption is that there was evidence to support the finding, and his judgment thereon will be affirmed. *Lumber Co. v. Anderson*, 474.

4. Appellant must show error on appeal, and where the judge of the Superior Court approves the report of the referee in holding that the services of an employee upon a county highway were not covered by the surety bond, this judgment will be upheld when the record is silent as to the character or necessity of the work for which compensation is claimed. *Snelson v. Hill*, 494.

5. Exceptions to evidence taken before a referee, considered by the trial judge in ruling on the exceptions, will not be considered on appeal when such evidence does not appear in the record. *Realty Co. v. Fisher*, 503.

g Conclusiveness and Effect, Impeaching and Contradicting Record

1. The record of the case on appeal containing discrepancies will be taken by the Court as therein appearing. *S. v. Lee*, 714.

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1. Where the cause of action has been exclusively tried upon one theory in the Superior Court, the Supreme Court on appeal will determine it upon that theory alone. *Farris v. Hendricks*, 439; *McCall v. Lumber Co.*, 597.

F Exceptions and Assignment of Errors.

a Necessity Therefor

1. In order to sustain an appeal on the ground of the alleged failure of the judge to examine the evidence taken before a referee with a view to coming to his own conclusions before confirming the report, this fact must be made to appear, and exceptions thereto properly taken, it being required of the appellant to show error on appeal. *Forester v. Vyne*, 477.

2. Where no exceptive assignments of error are made in the lower court the alleged error will not be considered on appeal. *S. v. Wilson*, 534.

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1. An exception not set out in the appellant's brief, nor citing authority sustaining it is taken as abandoned on appeal. *Grant v. Power Co.*, 617.

c Exceptions Not Presented by Issues

1. Where the defendant does not submit issues presenting its contention that the flooding of the roads upon which plaintiff was dependent for access to his land was lawful because authorized by the county commissioners or the township highway commissions, assignment of errors to the charge in this respect will not be sustained. *Grant v. Power Co.*, 617.

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G Briefs.

a Rules in Regard to Copies of Briefs for Opposing Party

1. The appellee may not successfully move in the Supreme Court to have the case dismissed for the failure of the appellant to furnish him a copy of his brief when the brief was duly filed with the clerk under the rule, and he could have obtained one in the time prescribed by applying to the clerk, who is not under duty to either notify him or supply him a copy except at his request. *Turnage v. Dunn,* 105.

I Hearing and Rehearing.

a Petitions to Rehear

1. Extraneous petitions to rehear filed by laymen who are not parties have no proper place in a petition to the Supreme Court to rehear a case. *Furlough v. Highway Commission,* 160.

J Review (of instructions see Trial E g).

a Of Interlocutory Orders and Supplementary Proceedings

1. Where an order for an examination of an adverse party in order to obtain evidence is granted in an action in which the pleadings have been filed, an appeal from such order prior to the examination is premature, and will be dismissed. *Abbitt v. Gregory,* 9; *Johnson v. Mills Co.,* 93.

2. Where in an action for permanent injunction a temporary restraining order is issued upon motion of plaintiff, and at the hearing the evidence of plaintiff and defendant is contradictory, and an order continuing the restraining order to final hearing is made without findings of fact by the court or a request therefor by defendant, it is presumed that the court found the facts to be as alleged in the complaint upon the supporting evidence, at least prima facie, and the order of continuance will be affirmed. *Coach Co. v. Griffin,* 559.

3. The Supreme Court on appeal is not concluded by the findings of fact of the lower court in refusing to continue a temporary injunction to the final hearing, but when the order appealed from is based on findings of fact supported by sufficient evidence they will be deemed prima facie correct. *Board of Health v. Lewis,* 641.

b Of Discretion of Court

1. Where the trial court, within his discretion, has ordered a party to give to the other an inspection and copy of certain books, papers or documents containing material evidence, and the order is supported by sufficient findings of fact, and there is no evidence of abuse of such discretion, the order is not reviewable on appeal, and the appeal will be dismissed. *Abbitt v. Gregory,* 9.

2. The transfer of a cause from the court of one county to another in the discretion of the trial judge for the convenience of witnesses and to promote justice, C. S., 470, is not reviewable on appeal to the Supreme Court. *Power Co. v. Klutz,* 358.

3. A motion to set aside a verdict for excessive damages is addressed to the sound legal discretion of the trial judge and is not reviewable on appeal. *Murphy v. Power Co.,* 484.

APPEAL AND ERROR—*Continued.*

4. A motion to set aside a verdict of the jury as being against the weight of the evidence is addressed to the sound discretion of the trial court, and is not reviewable on appeal. *Hardison v. Jones*, 712.

c Of Findings of Fact

1. When the findings of fact by the referee are supported by any competent evidence, and are approved by the trial judge, they are not reviewable on appeal. *Wade v. Lutterloh*, 116; *Crown Co. v. Jones*, 208.

d Burden of Showing Error on Appeal. (On *certiorari* see *Certiorari* B b.)

1. The burden of showing error on appeal to the Supreme Court is on the appellant. *Corporation Commission v. Bank*, 38; *Jones v. Candler*, 382.

2. Where on appeal the Supreme Court is equally divided, one Justice being absent, the appellant having failed to show error, the judgment of the lower court is affirmed. *S. v. Golden*, 246.

3. The verdict of the jury, under correct instructions of the court, in favor of the defendant in an action to establish a resulting trust in lands, upon parol evidence, is upheld in the Supreme Court under the facts in this case. *Martin v. Martin*, 258.

4. The appellant from the denial of the Superior Court judge to grant injunctive relief must show error of the lower court, and where the judgment of the lower court does not show upon what state of facts the relief in equity was denied, and they are not otherwise made to appear, the judgment below will be affirmed in the Supreme Court, especially if it is made to appear that the plaintiff is a party in another and independent action wherein he could set up the same relief as sought in the present action. *Lineberger v. Cotton Mills*, 506.

5. The verdict of the jury will not be disturbed on appeal when there is sufficient evidence to support it, in the absence of error of law in the trial. *Jennings v. Keel*, 675.

e Harmless Error, and Questions Necessary to Determination of Cause

1. Exceptions to the instructions of the court to the jury must be to prejudicial error to entitle the appellant to a new trial. *White v. Mitchell*, 89.

2. Where but one inference of fact can be drawn from all the evidence in the case, and the jury has accordingly so answered the issue, an erroneous instruction thereon is not reversible error. *Credit Co. v. Teeter*, 232.

3. Where the verdict of the jury is in accordance with the admissions made by the parties at the trial, an incorrect instruction in other respects will not constitute reversible error. *Weeks v. Adams*, 512.

4. When on appeal the decision of the Supreme Court makes the action of the judge in granting a restraining order immaterial, it becomes unnecessary for the court to discuss error alleged in this respect. *Withers v. Comrs. of Harnett*, 535.

APPEAL AND ERROR—*Continued.*

5. Where the verdict of the jury is that one of the plaintiffs recover nothing in his action, the defendant's assignment of error in the refusal of the trial court to grant a nonsuit in respect to him need not be considered on appeal. *Welch v. Ins. Co.*, 546.

6. Where the answer to one issue is determinative of the case on appeal independently of the other issues submitted, the Supreme Court will not ordinarily consider exceptions arising upon the trial of the other issues. *Jennings v. Keel*, 764.

7. Where the jury upon sufficient evidence has answered the issues upon the caveat to a will sufficient to establish it as the last will and testament of the testator, the answer of the judge to another issue as a matter of law that the paper-writing and each and every part thereof was the last will and testament of the testator if erroneous, will not be considered as material or prejudicial error *In re Will of Carraway*, 742.

K Determination and Disposition of Cause.

a Remand for Necessary Parties

1. Where residuary legatees may take a surplus after the sale of land after the payment of a specific bequest, they are necessary parties to the sale of the land to give the purchaser a clear fee-simple title, and on appeal the cause will be remanded for them to be made parties. *Shull v. Rigby*, 4.

2. When the parties to the litigation agree upon the facts and waive a jury trial, their agreement cannot affect others who have a legal right in the judgment to be rendered, and where the lower court has rendered judgment upon the agreed facts without the joinder of such other parties the cause will be remanded to be proceeded with according to law. *Thomas v. Reavis*, 254.

b Remand for Proper Judgment

1. Where the clerk of the court has allowed certain attorney's fees out of the proceeds of sale in an action for partition of lands, and on appeal to the Superior Court the clerk's judgment has been affirmed without a finding of material facts or conclusions of law by the judge, upon appeal to the Supreme Court the case will be remanded for the material findings of fact and conclusions of law necessary to support the judgment, and necessary as the basis of review. *Creecy v. Cohoon*, 7.

c Remand for Necessary Facts

1. Where sufficient facts do not appear in the record on appeal for the Supreme Court to properly pass upon the matters of law presented, the case will be remanded. *In re Estate of Prudden*, 69.

2. Where a judgment of the lower court is rendered upon an insufficient or contradictory statement of facts agreed upon by the parties, the case will be remanded for a consistent statement of facts or for trial by jury. *Fulenwider v. Rendleman*, 251.

d Modification and Affirmance

1. Where there is no error of law in the trial of the case in the lower court except on the separate issue of exemplary damages, which

APPEAL AND ERROR—*Continued.*

are not recoverable in the action, the answer of the jury on this issue will be stricken out on appeal, and the judgment of the lower court as thus modified will be affirmed. *Perry v. Bottling Co.*, 690.

L Proceedings in Lower Court after Remand.

1. Where it plainly appears from the pleadings, records and briefs on a former appeal to an opinion of the Supreme Court that all matters involved therein had been decided adversely to the appellant except one upon which a new trial had been ordered, the decision thereon is the law of the case and will not be considered again upon a second appeal involving them. *New Bern v. Telegraph Co.*, 14.

ARBITRATION AND AWARD.

A Right Thereto and Defenses.

a Waiver, Election, or Estoppel

1. Where the plaintiff brings action not to enforce the terms of an award, but for the alleged breach of the contract arbitrated, he may not at the trial insist upon the terms of the unpleaded award over the protest of the defendant, and there was error in the holding of the lower court that the parties were bound thereby. *Hicks v. Sykes*, 255.

ARREST OF JUDGMENT—see Criminal Law J.

ASSAULT UPON A FEMALE.

C Evidence.

a Weight and sufficiency

1. Upon the issue of whether the defendant committed an assault upon a female, her testimony that she was suddenly caught from behind by her arms by the defendant and that she freed herself by her violent exertions and that the defendant explained that he wanted to know how her arms felt, is sufficient to take the case to the jury. *S. v. Gooding*, 710.

ASSAULT WITH INTENT TO KILL—see Homicide D.

ASSESSMENTS—for public improvements see Municipal Corporations G c.

ASYLUMS—Misfeasance of Officer thereof see Public Officers C c.

ATTACHMENT—Priority between attachment and chattel mortgage see Chattel Mortgages B c 1; priority between attachment and conditional sales contract see Sales I a 1, 2.

ATTORNEY AND CLIENT.

D Fees.

1. Attorneys rendering services to a party litigant are entitled to at least nominal compensation in their action to recover upon *quantum meruit*. *Ward v. Agrillo*, 95.

AUTOMOBILES—Negligent driving thereof see Highways B—Husband's liability for negligent driving of wife see Husband and Wife B a—Parent's liability for negligent driving of child see Parent and Child A a—Master's liability for furnishing servant defective truck see Master and Servant C b 7—Injury caused by concurrent negligence of driver and another is joint tort see Parties B a 1, 2.

BANKS AND BANKING. (Banks as County Treasurers see Counties B a—Liability of banks on checks see Bills and Notes I.)

C Functions and Dealings.

b Representation of Bank by Officers and Agents

1. Where a president and director of a bank acts in his own interest in procuring from the defendant the note sued on by the bank, which is named payee therein, given for the accommodation of the officer alone, the knowledge of such officer will not be imputed to the bank. *Trust Co. v. Anagnos*, 327.

2. Where a bank is made the payee of a note, and the evidence tends to show that it was given to the bank's president for his own accommodation in an exchange of notes, there is a reasonable inference that the exchange of notes was made to enable the president to make illegal use of the funds of the bank. *Ibid.*

D National Banks.

a Ultra Vires Acts in General

1. The effect of an *ultra vires* act of a national bank is to be determined by the decisions of the Federal Supreme Court, which hold that an *ultra vires* act is void as being without the power of a corporation, and that ratification cannot affect the limitations of this power. *Comrs. of Brunswick v. Bank*, 198.

b Signing as Surety Bonds of Banks Acting as County Treasurer

1. The act of a national bank in signing as surety the bond given by another bank acting as county financial agent, chapter 262, Public-Local Laws 1925, is *ultra vires* and void. *Comrs. of Brunswick v. Bank*, 198.

bb Recovery of Property Given Under Ultra Vires Act in Signing Bond as Surety

1. The doctrine that where a corporation does an *ultra vires* and void act the party parting with money or property on the faith of the unlawful contract may recover it back or be compensated therefor does not arise upon suit against a national bank as surety on the bond of another bank acting as financial agent of a county where the consideration for becoming surety is a deposit of part of the county funds, for the reason that the national bank receives no money or property from the county, but the bank, the principal on the bond, has a valid claim against the receiver of the national bank for the amount so deposited with it. *Comrs. of Brunswick v. Bank*, 198.

H Stockholders, Depositors, and Creditors.

b Right to Bring Action Against Officers for Wrongful Depletion of Assets

1. The depositors and creditors of a bank in a receiver's hands may maintain an action against the officers of the bank to recover in behalf of the bank damages alleged as resulting from their unlawful, wrongful and negligent conduct, and a demurrer to a complaint alleging this cause of action and not claiming damages resulting thereby to the individual plaintiffs, with further allegations that the receiver had refused to bring the action, is bad and properly overruled. *Ham v. Norwood*, 762.

BANKS AND BANKING—*Continued.*

2. The right of action against the officers of an insolvent bank for their negligence or wilful misconduct as such officers vests in the receiver of the bank duly appointed by the court, and after his refusal of the demand of the depositors and creditors of the bank to bring the action, and it is brought by them for and in behalf of the bank, the receiver is a proper party defendant to administer the recovery, if any, in its proper distribution among the creditors and stockholders according to priority. *Ibid.*

3. The depositors and creditors of a defunct bank in a receiver's hands may bring an action in behalf of the bank against its officers for their unlawful, negligent, or wilful acts, causing its insolvency when the receiver has refused to bring the action, and a demurrer by a defendant to their complaint for misjoinder of parties and causes of action is bad. *Ibid.*

4. The court in the exercise of its sound discretion may pass upon the question of ordering the receiver of a defunct bank to bring an action against its officers for the wrongful depletion of assets upon the demand of the depositors and creditors, and in the absence of such order, the complaining depositors and creditors may maintain the action in behalf of the defunct bank, making the receiver a party defendant, at their own risk as to the cost of the action. *Ibid.*

5. Where the depositors and creditors of a defunct bank in a receiver's hands bring action for the benefit of the bank and against its officers for their negligent, unlawful, or wilful acts causing its insolvency, and the allegation in the complaint that they had made demand upon the receiver to bring the action and that he had refused, is denied, a jurisdictional issue is raised for the finding of the jury as to the controverted fact. *Ibid.*

6. Where the complaint in an action brought against the officers of a defunct bank alleges that the damages for their negligence occurred while they were such officers: *Held,* sufficient, and distinguishable from *Trust Co. v. Pierce,* 195 N. C., 717. *Ibid.*

BILL OF DISCOVERY (Appeal from order therefor see Appeal and Error J a 1).

A Nature and Extent of Remedy in General.

1. Both an examination of an adverse party and an order for an inspection of writings in his possession or under his control may be had under our statutes. *Abbitt v. Gregory,* 9.

B Examination of Adverse Party.

a Right Thereto in General

1. A party to a suit has the right to examine an adverse party before a judge, commissioner appointed to take depositions, or before the clerk of the court, upon giving five days notice to the adverse party, and it is not necessary to obtain leave of court to make such examination, C. S., 900, and this result is not affected by the nonresidence of the adverse party when such party has submitted to the jurisdiction of the court by filing pleadings. *Abbitt v. Gregory,* 9.

BILL OF DISCOVERY—*Continued.*

b Grounds therefor and Allegations Necessary to Support Order

1. An application for an order for the examination of an adverse party under C. S., 901, must contain positive averments, and must not be argumentative, and mere statements that the examination is necessary and material is not sufficient, but the statute will not be construed so as to preclude an examination of an adverse party when the affidavit shows good faith, necessity, and materiality, and where it is alleged that the necessary information cannot be had from any person except the adverse party because all other persons with such information are outside the jurisdiction, the application is sufficient, and an order based thereon will be upheld. *Bell v. Bank*, 233.

C Inspection of Writings.

a Order for Inspection of Writings within Discretion of Court

1. It is within the sound discretion of the trial court to order a party to give to the adverse party an inspection and copy of any books, papers and documents in his possession or under his control which contain evidence relating to the merits of the action or the defense thereto. C. S., 1823. *Abbitt v. Gregory*, 9.

b Grounds therefor and Allegations Necessary to Support Order

1. While a "roving commission for the inspection of papers" will not be ordinarily allowed, an application for an order for inspection of writings is sufficiently definite when it refers to papers under the exclusive control of the adverse party, which relate to the immediate issue in controversy, which could not be definitely described, and an order based thereon will be upheld. *Bell v. Bank*, 233.

BILLS AND NOTES (Liability on notes secured by mortgage upon deficiency after foreclosure see Mortgages H k).

A Requisites and Validity.

a Consideration

1. Where the husband and wife give their note in payment for an automobile used as a family car, the consideration therefor is sufficient to support an action against her. *Randolph v. Lewis*, 51.

2. Where there is evidence tending to show that the president of a bank had received from the defendant an exchange of notes for the former's benefit, and that the defendant in the bank's action on the note admits its execution and delivery, it is prima facie evidence that the note was given for a consideration under the provisions of our statutes, C. S., 3004, 3005, and defendant must show failure of consideration when relied upon by him. *Trust Co. v. Anagnos*, 327.

3. In law a valuable consideration may consist in some right, interest or benefit accruing to one party, or in some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. *Ibid.*

f Duress

1. Where a note is given by a husband and wife, and the husband procures her execution by duress, the note is voidable only, and is

BILLS AND NOTES—*Continued.*

good in the hands of a holder in due course for value, and without notice of the duress. The distinction between duress in the procurement of the execution and duress in the execution pointed out by ADAMS, J. *Randolph v. Lewis*, 51.

B Negotiability and Transfer.

a Transfer without Endorsement

1. Where a note, secured by a mortgage, is executed to husband and wife they hold title as tenants in common, and where a decree of partial divorce is granted, and the husband transfers his interest in the notes to his mother by a registered paper-writing, and there is evidence that the paper was signed in his handwriting, and the wife claims that certain money for the support of their children has not been paid: *Held,* in an action by the mother for one-half the proceeds of the note, the registered paper-writing is competent evidence of the transfer of interest, C. S., 3030, unless otherwise inadmissible, and the effect of the decree of divorce and the question of fraud between the assignor and assignee are matters to be presented in course of procedure, and a judgment of nonsuit should not be granted. *Dozier v. Leary,* 12.

C Rights and Liabilities on Endorsement or Transfer.

d Bona Fide Purchasers

1. Where a negotiable note is in the hands of a holder properly endorsed to him it is prima facie evidence that he is holder in due course without notice of any infirmity in the instrument, subject to rebuttal, but where there is evidence of fraud in its procurement, the burden is upon such holder to prove that he had acquired the instrument as a bona fide purchaser in due course and without notice, and on conflicting evidence the fact is for the jury to determine. *Clark v. Laurel Park Estates,* 624.

2. Where there is evidence that a trustee in a deed of trust of lands in a development scheme held for the benefit of the owners of the land by the recitations in the deed of trust and other conveyances relating to the sales, and by the declaration of the trust officer of the trustee corporation, and evidence *per contra* that the property was held in trust for bondholders having money in the development company, and the trustee knew, or by reasonable inquiry should have known, of fraud practiced in the sale of the lots by the development company, and has in its provisions the notes secured by mortgage endorsed to it by the development company, the question of its being a holder in due course is one for the jury.

Held, the evidence that the holder of the negotiable instruments in this case had knowledge of the fact that the same were procured by fraud or had knowledge of facts which should have put him on reasonable inquiry which would have discovered the fraud is sufficient to be submitted to the jury. *Ibid.*

H Actions (On lost notes see Lost Instruments—Parol evidence affecting notes see Evidence J a 3, 4—Counterclaim in action on note see Pleadings C a—Of proving defense of fraud see Evidence C b 1).

BILLS AND NOTES—*Continued.*

a *Burden of Proof*

1. Upon the admission of the execution of a note the burden is upon the defendant to prove payment when relied on by him. *Wooten v. Bell*, 654.

2. Where the execution of the note in suit is not admitted by defendant the burden of proof is on the plaintiff to show it. *Hardison v. Jones*, 712.

I Checks and Drafts.

a Acceptance and Liability of Drawee Bank

1. While a bank is not liable to the payee of a check for moneys drawn on it by a depositor having sufficient funds therein until acceptance or certification by the bank, C. S., 3171, acceptance may be evidenced in various ways, as where it pays the check without endorsement to some person unauthorized by the payee to receive it and charges the amount to the depositor's account, and where evidence on this point is conflicting an issue is raised for the jury, and a judgment as of nonsuit should be denied. The question of the maker's liability to the bank under a written instruction to pay the check as if made payable to bearer is not presented by the record, and is not decided. *Dawson v. Bank*, 134.

2. A drawee bank of a check of its depositor is not liable in damages on the ground that the check had been paid by it without endorsement of the payee when it appears that the check had been paid and the proceeds applied to a debt for the payment of which it had been issued, and when the evidence is conflicting thereon the question is for the jury under proper instructions. *Bell v. Bank*, 233.

b Rights and Liabilities of Drawer, Payee, and Banks in Course of Collection

1. Where a check is received by the drawee bank from banks in course of collection, and the drawee bank marks it "paid" and charges the amount to the account of the drawer, and sends the collecting banks its draft on a third bank in payment, which draft is not paid because of insufficient funds: *Held*, the check was not paid by the drawee bank, its giving its worthless draft and marking the check "paid" not amounting to legal payment, and the debt of the drawer is not discharged thereby. *Moore v. Construction Co.*, 142.

2. Where a check is drawn on a bank which was insolvent and unable to pay the same at the time the check was drawn, negligence of banks in course of collection, if any, in presenting the check for payment could not cause damage, and is not actionable. *Ibid.*

3. A bank that receives for collection drafts from the duly authorized agent of another and advances the money on them, of which the principal receives the benefit, and the drafts are not paid when presented to the drawee bank in due course for collection owing to its insolvency, the bank of deposit may maintain an action against the principal for the money so advanced, when it is found as a fact, by the trial court, to which no exception is taken, that

BILLS AND NOTES—*Continued.*

the collecting bank was the agent of the drawee and not the owner of the drafts, on the ground that the principal is liable for the default of his agent. *Bank v. Peanut Co.*, 730.

e Right of Action and Defenses

1. Evidence by the payee, in an action against him to recover upon a postdated check "for value received" that it was given in payment for a pair of mules, and that the check was to be cashed only in the event that the parties agreed that the mules were to be sold for cash, but upon certain terms of credit if sold on credit, and that the latter was agreed upon, should be submitted to the jury, and a judgment rendered on the admission of the defendant that he executed the check is erroneous. *Wingate v. Causey*, 71.

BLOODHOUNDS see Criminal Law G o.

BOARD OF EDUCATION see Schools and School Districts.

BOARD OF HEALTH see Cemeteries B b.

BONA FIDE PURCHASERS see Bills and Notes C d.

BONDS—Municipal bonds see Taxation A a—Surety bonds for construction of highway see Principal and Surety B b, for public officers see Principal and Surety B c—Bonds in Claim and Delivery see Replevin G.

BOTTLING COMPANIES see Food.

BOUNDARIES see Deeds and Conveyances D.

BRIEFS see Appeal and Error G.

BROKERS.

E Actions for Commissions.

1. Where the only question in an action to recover a broker's commission is a denial of any contract made between the parties, without allegations that the alleged contract was not performed by plaintiff in accordance with its terms, or that the plaintiff was entitled to recover only his costs incurred in procuring the loan, the defendant may not complain that there was error in the trial court's not submitting to the jury these contentions. *Patterson v. Blomberg*, 433.

BURGLARY AND BREAKING AND ENTERING OTHERWISE THAN BURGLARIOUSLY.

C Prosecution and Punishment.

a Recent Posession as Evidence of Crime

1. Whether recent possession of stolen goods is sufficient in point of time to raise the presumption of guilt is ordinarily one of fact for the jury, and where the evidence tends to show that the owner had placed a watch and some money on a table in his room on retiring to bed a certain night and that the next morning they were gone, with further evidence that the room had been broken into and the articles thus taken: *Held*, the possession of the watch by

BURGLARY AND BREAKING AND ENTERING OTHERWISE THAN BURGLARIOUSLY—*Continued.*

the defendant some two weeks later and his conflicting and incomplete statements as to how he obtained possession is sufficient evidence of burglarly to raise a question for the jury and resist a motion as of nonsuit. *S. v. White*, 1.

2. Where several defendants are on trial under an indictment for breaking into the dwelling of another and for larceny therefrom, evidence that the stolen goods were found some three days after the committing of the offense in the possession of them all, is sufficient with other facts and circumstances to take the case to the jury under the doctrine of "recent possession," including the unlawful breaking and entering into the dwelling otherwise than burglarious entering. *S. v. Lambert*, 524.

BUS LINES.

B Accidents and Injuries to Passengers.

c Contributory Negligence of Passenger

1. Where a passenger on a crowded bus rides on the fender of the bus with the expressed or implied consent of the company, and places himself so as to obstruct the line of vision of the driver, and this proximately causes a collision in which he is injured, his contributory negligence will bar his recovery. *Kuykendall v. Coach Line*, 423.

CANCELLATION AND RESCISSION OF INSTRUMENTS (Cancellation of mortgages see Mortgages G.)

A Right of Action and Defenses.

a Right to Rescission in General

1. In order for the plaintiff to be entitled to the equitable relief of rescission of a contract for fraud he must be in a position to put the parties in *statu quo* by restoring the benefits received thereunder. *Clark v. Laurel Park Estates*, 624.

b Fraud

1. When a land development company has platted a large area of land to be sold into lots, and represents that it has money in the bank to pay for street and other improvements, including the erection of a fine hotel, and relying on these representations and induced thereby one has purchased a lot of the land so situated as to be more largely benefited in regard to its location near the hotel, under written assurance from the owner that he as a representative of the company would sell the lot at a profit so as to save the purchaser harmless: *Held*, the failure of the company to fulfill these material promises is sufficient evidence of the fraudulent intent of the promisor to be submitted to the jury and to sustain their verdict for rescission of the contract, and the purchaser may recover the moneys he has paid in the transaction. *Clark v. Laurel Park Estates*, 624.

CARRIERS see Railroads, Bus Lines.

CAVEAT see Wills D.

CEMETERIES.

B Suits to Enjoin use of Cemeteries.

a Grounds Therefor: Nuisance, Public Health

1. Upon findings of fact supported by sufficient evidence that a cemetery was not on the watershed of a city, and that the stream draining the cemetery was already unfit for domestic use, and that the cemetery would not contaminate the stream nor pollute the wells or springs on nearby lands, nor injure the health of the citizens of the city or the residents of the area drained by the stream, and that the resolution of the county board of health in prohibiting the use of the cemetery was unconstitutional and void for the purpose of passing upon the question: *Held*, the dissolving of the temporary injunction restraining the further burial of dead bodies in the cemetery was not erroneous upon the hearing of a notice to show cause why the temporary order should not be continued to the final hearing. *Board of Health v. Lewis*, 641.

2. Whether the maintenance of a cemetery is a menace to the public health and subject to abatement as a nuisance depends upon the position and extent of the burial grounds and especially upon the manner in which the burials are effected, and a cemetery will not be regarded in law as a nuisance *per se*. *Ibid.*

b Findings and Orders of Board of Health

1. The findings of the county board of health that the maintenance of a cemetery upon the watershed is a nuisance to the public health has not the same force as the positive declarations of statute, and it may be shown in answer to a notice to show cause why an injunction should not be continued to the final hearing that the particular cemetery, as maintained, was not a nuisance entitling the plaintiff to injunctive relief. C. S., 7085. *Board of Health v. Lewis*, 641.

CERTIORARI.

B Proceedings and Determination.

b Burden of Showing Error

1. Upon *certiorari* from the Supreme Court in *habeas corpus* proceedings in matters of extradition, the burden is on the party alleging error in the judgment of the lower court to show it, and when it does not appear of record that the petitioner had been charged with crime by and within the state of demand, the judgment of the lower court that the prisoner be discharged will be upheld. *In re Veasey*, 662.

CHAIN STORES—Taxation of See Taxation A d 2.

CHATTEL MORTGAGES (Conditional sales see Sales I).

B Registration and Indexing.

b Indexing and Cross-Indexing

1. Where for years a proper index of chattel mortgages has been kept in the books wherein the instruments were registered, it is a subtantial compliance with the requirements of C. S., 3560, 3561, that the board of commissioners of a county "shall cause to be made

CHATTEL MORTGAGES—*Continued.*

and consolidated into one book a general index of all deeds and other documents in the register's office," it appearing that the record of the instrument could have been found with an ordinary search such as a man of ordinary prudence would have made. *Whitehurst v. Garrett*, 154.

2. An indexing of chattel mortgages is an essential part of their registration. C. S., 3360, 3361; C. S., 3311. *Ibid.*

c Lien and Priority

1. The claim of an attaching creditor is superior to a lien under a prior unregistered chattel mortgage. *Salassa v. Mortgage Co.*, 501.

G Transfer of Property by Mortgagor.

a Authority to Transfer

1. Where a mortgagee of an automobile permits the mortgagor, a dealer, to keep it on display at his show room for sale with others therein, and the mortgage sufficiently describes the property, giving the serial and motor numbers, and is duly registered under the provisions of C. S., 3311, the mortgagee by his conduct does not lose his right of lien as against a subsequent purchaser from the dealer, and the doctrine of implied authority to the dealer to sell the machine free from the mortgage lien as agent of the mortgagee does not apply under the facts of this case. *Whitehurst v. Garrett*, 154.

b Rights and Liabilities of Parties

1. Where the seller of an automobile since discharged in bankruptcy obtains from the State a certificate of clear title for the purchaser, and suppresses the fact that there was an existing registered chattel mortgage on the car, which the latter was later forced to pay: *Held*, the seller is liable in damages to the purchaser for the fraud practiced upon him. *Isler v. Brown*, 685.

CHECKS see Bills and Notes I.

CHILDREN see Infants—Degree of care required of drivers in regard to, see Highways B d—Duty to instill silver nitrate in eyes of newborn child see Physicians and Surgeons C b.

CIRCUMSTANTIAL EVIDENCE see Criminal Law G m, Abduction B a.

CITIES see Municipal Corporations.

CLAIM AND DELIVERY see Replevin.

CLERKS OF COURT—Duty to issue summonses see Process A b.

CODICILS see Wills C f.

COLOR OF TITLE see Adverse Possession A h.

COMMUNICATIONS WITH DECEDENT see Evidence D b.

CONSOLIDATED STATUTES (For convenience in annotating statutes).

SEC.

93. Testator may not disturb priority of creditors of estate. *Trust Co. v. Lentz*, 398.

160. Plaintiff must show cause of action instituted in one year, and defendant is not required to plead section. *Neely v. Minus*, 345.

160, 161. Damages for wrongful death not assets available to creditors. *Hines v. Foundation Co.*, 322.

421. Section does not apply to services intermittently rendered. *Phillips v. Penland*, 425.

430. Defective probate not color of title. *McClure v. Crow*, 657.

434. Section does not apply to right of municipality to acquire land by adverse possession. *In the Matter of Assessment v. R. R.*, 756.

447. Discharged employee has right of action against former employer for preventing him from obtaining other employment. *Goings v. Sargent*, 478.

470. Transfer of cause for convenience of witness, etc., is within discretion of trial court and not reviewable on appeal. *Power Co. v. Klutz*, 358.

476. When clerk of court must issue alias and pluries summonses. *Neely v. Minus*, 345.

513. Amendment to complaint may be allowed when cause of action is not substantially changed thereby. *Goings v. Sargent*, 478.

521. Judgment may be pleaded as counterclaim in action on contract. *McClure v. Fulbright*, 450. Damages caused by officer acting in claim and delivery is not pleadable as counterclaim therein. *Godwin v. Kennedy*, 244. Corporation may not plead as counterclaim debt due it by its president in action by purchaser for value from the president of the corporation's note. *Wellons v. Johnston*, 94.

564. Respective of judge and jury as to law and facts arising upon the evidence. *In re Will of Bergeron*, 649. Instructions as to speed allowed by law at intersection of highways not necessary when plaintiff is not struck at crossing. *Fisher v. Deaton*, 461.

567. Upon motion as of nonsuit all evidence will be considered, and if there is sufficient evidence offered by plaintiff or elicited from defendant's witnesses nonsuit should be denied. *Christopher v. Mining Co.*, 531; *Ellis v. Herald Co.*, 262; *Goss v. Williams*, 213. Right thereto is waived if motion is not renewed at close of all the evidence. *Gibbs v. Telegraph Co.*, 561; *Grant v. Power Co.*, 617.

577. Where court has ordered compulsory reference, to which no exception is made, he cannot thereafter set aside order of reference and submit the case to the jury because of error of law of referee. *Trust Co. v. Jenkins*, 428.

578. Court may re-refer case. *Mills v. Realty Co.*, 223.

595. Judgment by default final may not be had when amount is not definitely stated. *Byerly v. Acceptance Corporation*, 256.

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SEC.

614. Docketed judgment is lien on lands subject to homestead. *Farris v. Hendricks*, 439. But not on lands not owned at time of docketing. *Helsabeck v. Vass*, 603.

661, 1531. Justice of the peace taking case under advisement must give notice to parties of rendition to give opportunity to appeal. *Blacker Bullard*, 696.

671. Closed execution sale not subject to upset bid. *Weir v. Weir*, 268.

790, 2312. Alienage is disqualification of juror. *Hinton v. Hinton*, 341.

831. Burden is on plaintiff in claim and delivery. *Smith v. Cook*, 558.

900. Appeal from order for examination of adverse party is premature and will be dismissed. *Johnson v. Mills Co.*, 93. Party has right to examination without order of court, and nonresidence of defendant not bar thereto when it has submitted to jurisdiction by filing pleadings. *Abbitt v. Gregory*, 9.

901. Application for examination of adverse party must show facts upon which application is made. *Bell v. Bank*, 233.

970. Presumptive death not repealed by statute. *Steele v. Ins. Co.*, 408.

987. Promise upon a consideration moving to the promisor does not fall within provisions of section. *Jennings v. Keel*, 675.

1041, 1042. Power of Corporation Commission to order railroads to erect adequate station. *Corporation Commission v. R. R.*, 190.

1097. Defining jurisdiction of Corporation Commission. Jurisdiction of Superior Court derivative on appeal from commission. *Corporation Commission v. R. R.*, 190.

1140. When judgment for services rendered corporation becomes a prior lien. Section does not apply to officers of corporation. Priority to purchasers under foreclosure sale; purchaser has right to be party in suit to declare priority. *Helsabeck v. Vass*, 603.

1156. Liens attempted to be given preferred stockholders by stock and charter on corporation's land void as against creditors. *Ellington v. Supply Co.*, 784.

1241. When executor entitled to costs of action. *White v. Mitchell*, 89.

1268, 1270. Cost in criminal action not a part of punishment. *S. v. Smith*, 438.

1274, 1275. Successful party may recover amount of witnesses' tickets he has paid against losing party without assignment of tickets. *McClure v. Fulbright*, 450.

1290, 1291, 1297. Counties exercise powers expressly or impliedly given by statute as agency of State government. *O'Neal v. Wake County*, 184.

1389. Bank acting as county treasurer under this act does so by operation of statute and agreement with county not a contract within the meaning of the Constitutional provisions. Fed. Const., Art. I, sec. 10. *Trust Co. v. Edgecombe County*, 48.

CONSOLIDATED STATUTES—*Continued.*

SEC.

1436, 1473, 1474. Complaint determines jurisdiction as to whether in justice's court or Superior Court. *Roebuck v. Short*, 61.

1654. Grandson, whose father is living, takes by purchase and not by descent under grandfather's will. *Peele v. Corey*, 79.

1658. Our State courts have jurisdiction to annul marriage performed elsewhere. Only party to marriage may sue to annul marriage for irregularity in issuance of license. *Sawyer v. Slack*, 698.

1714, 1715. State Park Commission is agency of State and not subject to limitations of this section. *Yarborough v. Park Commission*, 284.

1744. Court may order sale of contingent interests in land on his own findings when sufficient. *DeLaney v. Clark*, 282.

1789. Itemized account of secretary of corporation presumed prima facie correct. *Wright Co. v. Green*, 197.

1790. Mortuary tables only evidentiary as to expectancy of life. *Young v. Wood*, 435.

1795. Widow may show that part of commingled funds were profits and not *corpus* of estate left her for life. Section does not exclude communications with living persons. *White v. Mitchell*, 89.

1823. Court may order examination of documents had by adverse party. *Abbitt v. Gregory*, 9.

2144, 2145. Where complaint alleges both good and bad cause of action demurrer thereto should be overruled. *Mayer v. Fenner*, 476.

2306. Courts will construe usury statutes as to substance of transaction and not its form. *Pratt v. Mortgage Co.*, 294.

2445. Foreman on construction of highway may recover for labor against surety on contractor's bond. 494.

2494. Marriage of female between ages of fourteen and sixteen by procuring license by fraud renders marriage voidable and not void. *Sawyer v. Slack*, 697.

2506, 2507. Where married woman receives check from her parents which she delivers to her husband the presumption is that he holds the property in trust for her. *Etheredge v. Cochran*, 681.

2591, 2343. Execution sale not subject to upset bid. *Weir v. Weir*, 268.

2591. Clerk has authority to order resale. Remedy as to distribution of proceeds is by independent action. *In re Bauguess*, 278.

2594. Entry on book by register of deeds should correctly recite the mortgage and notes submitted to be canceled. Sufficiency of notice to bind subsequent grantee. *Mills v. Kemp*, 309.

2598. Legal definition of intersection of highways. *Goss v. Williams*, 213.

2616, 2618. It is negligence *per se* to exceed legal speed limit on highways. *Goss v. Williams*, 213.

2617. Evidence sufficient to be submitted to jury on issues of negligence and contributory negligence in driving on highways. *Stevens v. Rostan*, 314.

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Sec.

2710(1). Where petition asks for assessment greater than that required at law, petitioners may not later ask reduction of assessments before subsequent board of commissioners on grounds alone that assessments exceeded that anticipated, and C. S., 2715, 2806 have no application. *McClester v. China Grove*, 301.

2832. The power given a city to maintain public schools applies whether or not the city has adopted plan of government under C. S., ch. 56. *Hailey v. Winston-Salem*, 17.

3004, 3005. Execution of negotiable instrument raises prima facie of consideration. *Trust Co. v. Anagnos*, 327.

3030. Evidence sufficient to show transfer of negotiable instrument without endorsement. *Dozier v. Leary*, 12.

3055. Lost or destroyed not within purview of this section. *Wooten v. Bell*, 654.

3171. Bank not liable to payee of check until acceptance by it is shown. *Dawson v. Bank*, 134.

3179. Certificate of clerk as to deed is presumptively correct. *Peel v. Corey*, 79.

3309, 3293. Must appear in deed that subscribing witness to deed was under oath. *McClure v. Crow*, 658.

3311. Indexing chattel mortgage is vital part of registration. *Whitehurst v. Garrett*, 154. Agreement purporting to give lien on lands of corporation to preferred stockholders void as to creditors unless registered. *Ellington v. Supply Co.*, 784.

3560, 3561. Substantial compliance as to indexing chattel mortgages. *Whitehurst v. Garrett*, 154.

3561. Indexing part of registration of mortgage. *Heaton v. Heaton*, 475.

3846(a), Vol. 3. Building highway public necessity—State Highway Commission—Injunctions. *Greenville v. Highway Commission*, 226.

4131. Section will be liberally construed as to finding holographic will among valuable papers. *In re Will of Groce*, 373.

4144. Endorsement of note and attachment to holographic will is effective as testamentary disposition. *In re Will of Thompson*, 271.

4145. Will probated in common form is not subject to collateral attack. *In re Will of Cooper*, 418.

4169. Share of estate of afterborn child not mentioned in father's will. *Trust Co. v. Lentz*, 398.

4214. Use of deadly weapon does not raise presumption of intent to kill. *S. v. Gibson*, 393.

4225. Adultery after elopement is essential element of abduction. *S. v. Ashe*, 387.

4255. Evidence tending to show opportunity and motive insufficient to be submitted to jury in absence of proof that others did not commit the crime. *S. v. Swinson*, 100.

CONSOLIDATED STATUTES—*Continued.*

SEC.

4268, 4270. Variance between proof and indictment. *S. v. Grace*, 280.

4300. Trespass is against possession and not title. *S. v. Earp*, 164.

4331. Indictment drawn under statute superceded by later statute entitles prisoner to discharge. *S. v. Reed*, 357.

4384. Indictment must specifically charge offense or motion in arrest of judgment will be allowed. *S. v. Anderson*, 771.

4390. Member of board of education not guilty under this section for voting for purchase of trucks from business operated by wife and in which he had no pecuniary interest. *S. v. Debnam*, 740.

4447, 4449, 4450. Power of court to provide for support of abandoned wife and children. Charge as to abandonment must include "wilful." Sentence under one section not to take effect upon compliance with sentence under other not objectionable as conditional judgment. *S. v. Vickers*, 239.

4477, 4478. Statute does not put burden on defendant to show either malice or actual damages in employer's blacklisting. *Goings v. Sargent*, 478.

4643. Motion of nonsuit will be denied if there is sufficient evidence in the whole case to be submitted to the jury. *S. v. Earp*, 164; *S. v. McLeod*, 542; *S. v. Lawrence*, 562. Evidence held sufficient to be submitted to jury on indictment for murder. *S. v. McLeod*, 542; *S. v. Lawrence*, 562; *S. v. Carr*, 129.

4697. Analysis of ingredients of fertilizer by State chemist as evidence. *Godwin v. Kennedy*, 244.

6436, 6437. Provisions of policy of fire insurance are those of the law—Vacancy permits—Representation of local agents. *Greene v. Ins. Co.*, 335.

6460. What insurer must show to avoid liability on policy of life insurance taken out without medical examination. *Holbrook v. Ins. Co.*, 333.

7065. Findings by board of health are not conclusive. *Board of Health v. Lewis*, 642.

7182. When physician not liable for use of stronger solution than that prescribed by statute. *Covington v. Wyatt*, 367.

7979. Remedy of corporation objecting to findings of board of assessment is to file exceptions with board with right of appeal to Superior Court, and tax assessed by board may not be paid under protest and recovered under this section. *Mfg. Co. v. Comrs. of Pender*, 744.

CONSPIRACY—In procuring subscriptions to stock see Corporations D h 1, 2.

CONSTITUTION (For convenience in annotating).

ART.

I, sec. 17. "Due process" and "law of the land" are identical in meaning. Taking of land by Park Commission under statute is constitutional, and only parties in interest may bring suit to enjoin taking by Park Commission. *Yarborough v. Park Commission*, 284.

CONSTITUTION—*Continued.*

ART.

II, sec. 12. Act establishing Park Commission is a public act and does not fall within the provision of the Constitution in regard to notice required before passage of private act. *Yarborough v. Park Commission*, 284.

II, sec. 29. Act creating Park Commission and vesting it with certain powers is not a special or private act prohibited by the Constitution. *Yarborough v. Park Commission*, 284. Annexing territory within school district by city not a prohibited local act. *Hailey v. Winston-Salem*, 17.

IV, sec. 8. Jurisdiction of Supreme Court on appeal. *Goss v. Williams*, 213.

IV, sec. 9. Withdrawal of certain powers from Insurance Commissioner by statute does not impair vested rights of one claiming right to recover under prior power. *O'Neal v. Wake County*, 184.

IV, sec. 27. Complaint determines jurisdiction of court—Justices of the Peace. *Roebuck v. Short*, 61.

V, sec. 3. Includes taxation on tangible and intangible property—Trades—Incomes. Classification of property for taxation must be based upon substantial difference. *Tea Co. v. Doughton*, 145.

V, sec. 4. Act establishing Park Commission with certain powers of condemnation is not a lending of the credit of the State to person, firm, or corporation, and does not require approval of voters. *Yarborough v. Park Commission*, 284.

VI, sec. 6. Implies a secret ballot, and right thereto not waived unless voters are informed of right. Election void if voter is deprived of right to secret ballot. *Withers v. Comrs. of Harnett*, 535.

VII, sec. 7. City's sale of land used as park and giving proceeds to municipal park commission does not fall within provisions of this article. *Hall v. Redd*, 622. Power given municipality to maintain schools also gives implied power to hold necessary election. Vote of those in territory annexed by city not required either on question of annexation or upon bonds issued for municipal school purposes. *Hailey v. Winston-Salem*, 17.

X, sec. 2. Docketed judgment is lien on lands subject to homestead exemption. *Farris v. Hendricks*, 439.

X, sec. 6. Where wife delivers to husband gifts she has received from her parents the presumption is that he holds it in trust for her. *Etheredge v. Cochran*, 681.

X, sec. 8. Wife must join in alienation of homestead. *Farris v. Hendricks*, 439.

CONSTITUTIONAL LAW. (Full Faith and Credit of proceedings of other States see Executors and Administrators A c—Constitutional restrictions on taxation see Taxation A—Contract with bank acting as County Treasurer not within Obligations of Contract Clause see Counties B a—Right to sue State not within Obligations of Contract Clause see State E a—Constitutional right to secret ballot see Elections G a—Annexation of territory by city see Municipal Corporations A b.)

CONSTITUTIONAL LAW—*Continued.*

I Due Process of Law—Law of the Land.

a Nature, Scope and Effect of the Federal and State Provisions in General

1. In construing the provisions of the Fifth and Fourteenth Amendments of the Federal Constitution and Article I, section 17, of the State Constitution in relation to taking private property for a public use: *Held*, the terms "due process of law" and "the law of the land" are substantially identical terms, the Fifth Amendment being obligatory on the Federal Government and the Fourteenth Amendment being a restriction upon the several States. *Yarborough v. Park Comm.*, 284.

2. Only those whose interests in the particular lands sought to be taken for the national park contemplated by chapter 48, Public Laws of 1927, sec. 27, may sue in equity for injunctive relief on the ground that their lands are about to be taken contrary to the provisions of the Fourteenth Amendment to the Federal Constitution and of Article I, section 17, of the Constitution of North Carolina. *Ibid.*

b What Constitutes Due Process of Law

1. The exercise of the power of eminent domain by the North Carolina National Park Commission is not contrary to the "due process" clause of the Federal Constitution, Fourteenth Amendment, or Article I, section 17, of the State Constitution, since notice and an opportunity to be heard is provided for those whose land is to be taken, and this result is not affected by the power given in the statute to the Superior Court to enjoin the owner of such land from changing the existing condition or character of the land sought to be condemned, since the person against whom such relief is sought is given ample opportunity for the protection of his right by the requirements that the clerk issue summons, publish notice setting forth the filing of the petition, the name of the petitioner and of every person named in the petition, a brief description of the land, a statement of the relief demanded, and the return day of the summons, and until these provisions are complied with no final order or judgment can be entered, and then only upon such terms as may be just. *Yarborough v. Park Comm.*, 284.

2. The Fourteenth Amendment to the Federal Constitution does not control the power of the State to determine the process by which legal rights may be asserted or legal obligations enforced if the method of procedure gives reasonable notice and a fair opportunity to be heard before the issues in condemnation proceedings are decided. *Ibid.*

CONTINGENT ESTATES see Wills E d.

CONTRACTS (Specific performance of, see Specific Performance—Reformation of, see Reformation of Instruments—With Counties see Counties C—With Bank acting as County Treasurer see Counties B a—Usurious Contracts see Usury—For sale of stock see Corporations D g—For services rendered see Executors and Administrators D a—To bid in land for amount of mortgage see Mortgages H k 1—Executory contracts of insolvent see Receivers E a—Independent contractors see Master and Servant D a—Election of remedies see Election of Remedies, Arbitration and Award A a 1).

CONTRACTS—*Continued.*

A Requisites and Validity.

b Parties, Proposals and Acceptance

1. A contract to enter into a future contract must specify all of its material and essential terms, and leave none to be agreed upon as a result of future negotiations. *Wade v. Lutterloh*, 116.

d Consideration (for bills and notes see Bills and Notes A a)

1. Where an executory contract contains several promissory covenants on both sides, it is not necessary that each promise on one side be supported by an obligation or promise on the other if it is a part of an entire contract which is supported by sufficient consideration. *Wellington v. Tent Co.*, 748.

2. Where there is a contract for the sale of certain goods at a stipulated price with the provision that if the production of the mill manufacturing them should be curtailed by strikes or unavoidable cause, deliveries thereunder were to be made in proportion to production, with further agreements that delay or defect in quality in any delivery should not be cause for canceling any portion of the contract other than the delivery in question, and that the contract should be subject to regulations by the seller of the amount of credit to be extended: *Held*, the contract is entire and supported by sufficient consideration, and is binding on both parties. *Ibid.*

B Construction and Operation.

a General Rules of Construction

1. If a contract is susceptible of two constructions, one of which will make it enforceable and the other unenforceable, the former construction will generally be preferred. *Wellington v. Tent Co.*, 748.

2. If an instrument is susceptible of two constructions, one of which makes it an executory contract and the other an option, the latter will be rejected because by the other construction mutual rights are conferred. *Ibid.*

d Place and Time of Performance

1. Where the contract leaves indefinite the performance of one of the covenants of a party, the law implies a reasonable time under the surrounding facts and circumstances. *Wade v. Lutterloh*, 116.

e Conditions and Covenants

1. The rule that covenants in a contract are ordinarily regarded as concurrent is one of interpretation and not of substantive law, and gives way to the intent of the parties as gathered from the construction of the whole instrument as to whether a condition is precedent, concurrent, or subsequent. *Wade v. Lutterloh*, 116.

2. Where the plaintiff alleges a contract for the division of profits to be derived from the sale of certain real estate provided a satisfactory sale was made within twelve months from the date of the contract, and alleges that he produced purchasers for the land, but that none of the offers was satisfactory to the defendant, and there is no allegation of fraud or arbitrary refusal to sell: *Held*, evidence sustaining these contentions was properly nonsuited. *Ingle v. Green*, 381.

CONTRACTS—*Continued.*

D Rescission and Abandonment.

a Recission for Fraud

1. Where a party enters into a contract to take over and complete the building of a highway, and upon setting about the completion of the highway discovers fraud in the procurement of the contract in misrepresentations as to the conditions of the highway, etc., he must rescind the contract upon the discovery of the fraud, and he cannot proceed under the contract and complete the highway and thereafter sue to rescind the contract for fraud in the procurement, and for his damages. *Hawkins v. Carter*, 538.

F Actions for Breach. (Measure of damages see Damages F b—Parol evidence affecting contracts see Evidence J—Customs and Usages see Customs and Usages.)

a Parties

1. When the issues in controversy raise the question as to whether the plaintiff sold certain goods to the defendant or to his son, the son is at least a proper party to the action, and should be made a party defendant before the trial of the action. *Hinnant v. Boyette*, 44.

b Necessity of Performance, Tender or Readiness to Perform

1. A party to a contract to enforce it must prove performance of his antecedent obligations arising thereunder or some legal excuse for nonperformance, and if the stipulations are concurrent, his readiness and ability to perform them. *Wade v. Lutterloh*, 116.

CORPORATIONS (Banking corporations see Banks and Banking—Taxation of corporations see Taxation C d—Persons entitled to maintain counterclaim on corporation's notes see Pleadings C a).

D Stock.

b Rights and Priorities of Preferred Stockholders

1. Our statute, C. S., 1156, and the amendments thereto, fixes the authority of a corporation formed thereunder to issue its preferred stock and the priorities thereof are always subject to the rights of creditors, and an attempt of the corporation to give the preferred stockholders a lien upon its realty in the nature of a mortgage or deed of trust under the provisions of its charter granted to it under the general law, the lien so attempted is inoperative as to the statutory prior right given the creditors of the corporation. *Ellington v. Supply Co.*, 784.

g Contracts for Sale of Stock

1. A purchaser of capital stock of a corporation upon the condition that he would take a certain proportionate amount of a fixed total, the seller the same number of shares, and that a disinterested third person would take the remaining two shares, the corporation thus to consist of the three persons, the transaction to be closed at a fixed date, the purchaser to give in payment his notes secured by a mortgage on his real estate upon terms to be agreed upon: *Held*, the seller in making demand upon him to take the shares must do so according to the terms of the agreement, within the

CORPORATIONS—*Continued.*

time specified, and when he has not done so, he may not recover damages for the failure of the purchaser to purchase the stock. *Wade v. Lutterloh*, 116.

h Actions for Fraud in Procuring Subscriptions to Stock

1. The fraudulent misrepresentations of an agent of a corporation in the sale of stock therein are not competent evidence against the officers and directors, sued individually, when the representations were not made in their presence nor afterwards ratified by them, in the absence of an issue of conspiracy to thus defraud the plaintiff. *Edwards v. Finance Co.*, 462.

2. In an action against the officers and directors of a corporation to recover damages for having been induced to subscribe to shares of stock in the corporation by fraudulent representations of others acting as sales agents of the corporation, which were not made in the presence of the defendants nor afterwards ratified by them, and there is evidence of a conspiracy to thus defraud, it is reversible error for the trial judge to refuse to submit the issue as to the conspiracy to the jury for their determination. *Ibid.*

G Corporate Powers and Liabilities.

f Liability to Employees for Services

1. The provisions of C. S., 1140, that mortgages of a corporation will not exempt the mortgaged property from execution for the satisfaction of any judgment obtained in the courts of the State against such corporation for labor and clerical services performed, etc., creates a priority in favor of those performing labor or rendering clerical services only from the time a judgment has been entered by a court of competent jurisdiction ascertaining the amount and declaring the priority, and when so established it relates back and becomes prior to that of general creditors of the corporation under a prior registered judgment. *Helsabeck v. Vass*, 603.

2. C. S., 1140, is for the protection of employers of a corporation and not to its officers, the latter being deemed to be in position to know its financial condition when continuing to perform their duties. *Ibid.*

3. Where corporate property has been mortgaged and the mortgage foreclosed, and an execution is sought on this property by those claiming a priority under the provisions of C. S., 1140, for services and clerical work performed as employees of the corporation, and in a suit to restrain this execution it is denied that they were employees within the intent of the statute, but performed their duties as officers thereof: *Held*, reversible error for the trial judge to hold that they would be entitled to execution if they were officers of the corporation. *Ibid.*

4. A notice at a foreclosure sale of the property of a corporation under a mortgage that the employees of the corporation claim a priority under the provisions of C. S., 1140, does not affect the title conveyed to the purchaser at the sale, but the claimants after obtaining judgment against the corporation may maintain the superiority of their claims to those of the purchaser, but the purchaser is entitled to be heard, and may bring suit to restrain the execution. *Ibid.*

CORPORATION COMMISSION.

A Jurisdiction and Powers.

a In General

1. Where a State commission is created with jurisdiction over railroad companies operating within the State, the statute will be construed liberally to effectuate its purposes and to advance the remedy contemplated by the General Assembly. *Corporation Commission v. R. R.*, 190.

b In Regard to Railroads

1. Under the provisions of C. S., 1041, 1042, the Corporation Commission of this State has the power to require railroad companies subject to its jurisdiction, which have constructed or maintained a union passenger station in a city or town of the State, to construct or equip a new union passenger station in such city or town upon its finding that the present station is inadequate. *Corporation Commission v. R. R.*, 190.

B Actions and Proceedings before Commission.

a Parties

1. Where three railroad companies use a union station in a city in connection with the operation of their railroads, two as owners, and the other as lessee of a fourth road, it is not jurisdictional before the Corporation Commission or the Superior Court on appeal that in the proceedings before the Corporation Commission to compel them to build and maintain an adequate station, that the lessor railroad be a party, but it is not error for the trial judge to order that the lessor road be made a party and the cause proceeded with therein. *Corporation Commission v. R. R.*, 190.

C Appeals from Orders of Commission.

a Parties Who May Appeal

1. The jurisdiction of the Corporation Commission is original, to be exercised either upon its own motion or upon petition of interested parties, and only parties whose property rights may be affected have the right to appeal to the Superior Court, C. S., 1097, and the jurisdiction of that court is derivative. *Corporation Commission v. R. R.*, 190.
2. The appeal of those who are not parties to the proceedings before the Corporation Commission should be dismissed in the Superior Court for want of jurisdiction. *Ibid.*

b Jurisdiction of Superior Court on Appeal from Commission

1. On appeal from an order of the Corporation Commission to compel railroad companies to submit plans for a new union depot on account of the inadequacy of the existing one, the Superior Court has jurisdiction to try and determine both issues of law and issues of fact arising upon exceptions taken by the appellant during the hearing before the Commission, and the trial as to the facts at issue is *de novo*. *Corporation Commission v. R. R.*, 190.

COSTS (In criminal prosecutions see Criminal Law K c).

A Persons Entitled.

a Executors

1. Where the action involves the question as to the recovery of a portion of the estate of a deceased person, and judgment is rendered in favor of the executor, the plaintiff, he is entitled to a judgment for costs. C. S., 1241. *White v. Mitchell*, 89.

b Party Recovering Judgment

1. The party to an action summoning witnesses to testify in his behalf is liable for their witness fees which may be recovered in an action against him, and when it appears of record entry of the judgment by the clerk of the Superior Court that these fees have been taxed against the party recovering the judgment, and paid by him, he is entitled to recover them against the losing party to the action without showing that the witnesses had transferred or assigned their tickets to him. C. S., 1274, 1275. *McClure v. Fulbright*, 450.

COUNSEL see Attorney and Client.

COUNTIES (Right to issue bonds see Taxation A a—Board of Education see Schools and School Districts A a).

A Governmental Powers and Functions.

a Governmental Powers in General

1. A county is a body politic and corporate to exercise as an agent for the State only such powers as are prescribed by statute and those which are necessarily implied therefrom by law, essential to the exercise of the powers specifically conferred. C. S., 1290, 1291, 1297. *O'Neal v. Wake County*, 184.

B Officers, Agents and Employees.

a Banks Acting as County Treasurer (National banks as surety on bond see Banks and Banking D b)

1. Where the office of county treasurer has been abolished and a bank or trust company has been appointed under the provisions of C. S., 1389, to perform the duties of treasurer, and receive as compensation the profits of the moneys deposited by the county arising in the course of the bank's business as such, the arrangement so made is not a contract between the county authorities and the bank contemplated by the provision of the Constitution prohibiting the impairment of the obligations of a contract, but the obligations arise by statutory provisions relating to public matters within legislative control, and the contention of the bank is untenable that the county may not at a later date, under authority of statute, require it to give bonds for the protection of the public funds, or to pay interest on the daily average balance. Public Laws 1927, ch. 146, sec. 19. *Trust Co. v. Edgecombe County*, 48.

C Contracts with Counties.

a Manner of Making Contract

1. It is essential that a county to exercise the powers to contract must act through its county commissioners as a body convened in legal session, regularly adjourned or special, and, as a rule, authorized

COUNTIES—*Continued.*

meetings are prerequisite to corporate action, which should be based upon deliberate conference and intelligent discussion of proposed measures. *O'Neal v. Wake County*, 184.

2. The commissioners of a county are without authority, constitutional or statutory, to enter into a joint meeting with other State governmental agencies functioning as entirely separate departments respectively of the county and the State, and therein make a binding corporate contract by the adoption of a joint verbal agreement to pledge the faith and credit of the county for its part in the payment for the employment of a person to render service in the capacity of a detective to determine and procure evidence against those who have committed a criminal offense. *Ibid.*

b Duration of Contracts of Employment

1. Where the period of employment under an alleged valid contract of the county is left indefinite, the presumption is that the time thereof is to be reasonable, and a period of six years, extending beyond the time for which the members have been elected to their office, is held to be unreasonable, and not within the contemplation of the county commissioners who are alleged to have made the contract in behalf of the county as its corporate obligation. *O'Neal v. Wake County*, 184.

COURTS (Jurisdiction of Supreme Court see Appeal and Error A—Decisions of Federal Courts as to National Banks see Banks and Banking D a 1—Justices of the Peace see Justices of the Peace).

A Superior Courts.

a Jurisdiction (Jurisdiction of suit to annul marriage see Marriage C a—on appeal from Corporation Commission see Corporation Commission C b)

1. To determine whether an action is brought in tort or on contract the complaint alone will be considered, and where the complaint alleges the wrongful and unlawful demand of one hundred dollars by the defendant of the plaintiff's wife, as money due to the defendant under a mistake in the payment of a check, and alleges that the money was paid the defendant by plaintiff's wife upon insistent demand, the complaint alleges an action in tort, and a demurrer to the jurisdiction of the Superior Court should not be sustained. Const., Art. IV, sec. 27; C. S., 1436, 1473, 1474. *Roebuck v. Short*, 61.

CRIMINAL LAW (Criminal liability of municipal officers see Municipal Corporations D e—of Public officers see Public Officers. Particular crimes see particular titles of crimes).

B Capacity to Commit and Responsibility for Crime.

a Mentality as Affected by Intoxicating Liquors and Disease

1. A person who from long continued use of alcoholic drinks and the long course of a disease affecting his mind is incapable of knowing the nature of his act in committing a murder or whether it was wrongful or not, as distinguished from the immediate effects of drink, will not be held in law guilty of the criminal offense of murder charged in the bill of indictment. *S. v. Lee*, 714.

CRIMINAL LAW—*Continued.*

C Parties to Offenses.

a Principals

1. Where upon the trial for larceny from a dwelling there is evidence tending to show that the several defendants indicted therefor were actually or constructively at the place of the crime either aiding, abetting, assisting, or advising its commission, or were present for such purpose, it is sufficient to be submitted to the jury as to the guilt of each of them as principals in the crime. *S. v. Lambert,* 524.

G Evidence (of particular crimes see particular titles of crimes).

d Materiality and Competency in General

1. Where evidence of the defendant's commitment for lunacy is relevant upon a trial for a homicide, and he has admitted he was committed for lunacy to a State institution, the rule that the State is bound by the defendant's replies to questions as to collateral matters is not violated when within the scope of his admissions. *S. v. Corriher,* 397.

g Flight as Evidence of Guilt

1. Flight of the accused after a homicide has been committed is competent with other relevant evidence as a circumstance to show guilt, subject to the explanation of the defendant, and he may give his testimony that he had been informed that the relatives of the deceased, of dangerous character, had threatened his life, and that he had been advised by his father to flee. *S. v. Mull,* 351.

2. When the defendant on trial for a homicide has been excluded from testifying to facts in explanation of his flight after the offense had been committed, and it is made to appear on appeal that such evidence was material to his defense, a new trial will be ordered. *Ibid.*

3. The credibility of the testimony of the defendant on trial for homicide in explanation of his flight thereafter, is for the jury. *Ibid.*

h Attempted Suicide as Evidence of Guilt

1. Evidence of an attempt by the defendant to commit suicide while on trial for murder is competent, taken in connection with other circumstances, to be considered by the jury upon the question of defendant's guilt. *S. v. Lawrence,* 562.

i Expert Testimony

1. In an action for homicide wherein the issue is dependent upon whether the deceased committed suicide or the defendants killed him, medical expert testimony that the deceased could not have killed himself with the gun is incompetent, the conclusion being in effect an answer to the only issue submitted to the jury, and being within the knowledge of an ordinary man, and one that the jury should have reached themselves in answering the issue submitted as to the defendant's guilt or innocence of the offense. *S. v. Carr,* 129.

j Testimony of Convicts, Accomplices and Codefendants

1. While it is a rule of law that the evidence of a witness who is confined upon the roads for a criminal offense should be received with

CRIMINAL LAW—*Continued.*

certain caution, the failure of the judge to so charge the jury will not be held for error in the absence of a request for instructions by the appellant to that effect. *S. v. Shew*, 386.

m Weight and sufficiency

1. In order for the State to convict a defendant of a criminal offense it must show guilt beyond a reasonable doubt, and the sufficiency of the evidence in law to take the case to the jury does not depend upon the doctrine of chances, and a trial for the destruction of certain pages of a book in the office of the register of deeds, C. S., 4255, wherein the defendant's interest in so doing has been shown, it is required of the State to show that the offense was committed on the day the defendant had an opportunity to commit the offense, and a margin of several weeks, in which the offense might have been committed, during which time the books were open to the public generally, is insufficient evidence to be submitted to the jury, and defendant's motion as of nonsuit should have been allowed. C. S., 4643. *S. v. Swinson*, 100.

2. A defendant may not be convicted as an accomplice or fellow conspirator of another in committing a homicide, upon evidence that does not amount to more than a speculation or conjecture. *S. v. Carr*, 129.

3. A motion for judgment as of nonsuit upon the evidence should be granted when the evidence is purely conjectural as to the identity of the defendants tried for a violation of the prohibition statute. *S. v. Tuttle*, 385.

n Circumstantial Evidence

1. Circumstantial evidence, when of a sufficiently probative force, will take the case to the jury. *S. v. Lambert*, 524.

2. Circumstantial evidence is a recognized and accepted instrumentality in the ascertainment of truth upon the trial of a criminal offense. *S. v. McLeod*, 542.

3. Circumstantial evidence sufficient for conviction should be clear, convincing and conclusive, showing facts, relations, connections and combinations between the circumstances that are natural, clear, reasonable and satisfactory, excluding all reasonable doubt of guilt and every reasonable conclusion of innocence. *S. v. Lawrence*, 562.

o Bloodhounds

1. The action of bloodhounds may be received in evidence only when it is properly shown that they are of pure blood, that they possess the powers of acute scent and discrimination between scents, that they have been accustomed and trained to pursue the human track; that they have been found by experience to be reliable in pursuit, and that in the particular case they followed the trail of the guilty party in such way as to afford substantial assurance, or permit a reasonable inference of identification, and where this last element is lacking the admission of evidence of their actions over defendant's objection is reversible error warranting a new trial. *S. v. McLeod*, 542.

CRIMINAL LAW—*Continued.*

p Evidence of Identity

1. Testimony that a person who looked like the defendant was seen in the vicinity of the crime is competent and admissible to establish the identity of the defendant when taken in connection with other evidence of guilt. *S. v. Lawrence,* 562.

I Trial (of particular crimes see particular titles of crimes).

j Nonsuit

1. Where evidence is conflicting in a criminal case and where, considering the evidence in the light most favorable to the State, the jury might find the defendant guilty, a motion as of nonsuit is properly denied. C. S., 4643. *S. v. Carr,* 129.

2. A motion as of nonsuit in a criminal case at the close of the State's evidence, renewed after all the evidence has been introduced, does not confine its sufficiency to the time of the first motion, and will be denied if there is sufficient evidence in the State's behalf viewing all the evidence in its entirety. C. S., 4643. *S. v. Earp,* 164; *S. v. Lawrence,* 562.

3. Upon motion to dismiss under C. S., 4643, it is required that the court ascertain merely whether there is any sufficient evidence to sustain the allegations of the indictment and not whether it be true nor whether the jury should believe it. *S. v. McLeod,* 542. *S. v. Lawrence,* 562.

4. Where the defendant's motion as of nonsuit is not renewed at the close of his evidence, he waives his right to object to the sufficiency of the evidence. *S. v. Hargett,* 692.

k Verdict

1. It is the duty of the trial judge to see that the verdict of the jury is correctly received by the court, and where in a criminal action the jury has come back into court with their verdict and upon the announcement of a certain verdict by the foreman several of the jurors have contradicted it as the one agreed upon, it is correct for the court, before finally accepting it and before it is recorded, to have the jury again retire, and upon their reaching a different verdict to accept it and have it recorded as the verdict in the case. *S. v. Hargett,* 692.

2. Where in a criminal action the judge has properly accepted as final a verdict of the jury returned after a retirement for a second time, the defendant may not acquiesce in this course and then object to a judgment under the later and more severe verdict, and his motion in arrest of judgment on that ground will be denied. *Ibid.*

J Motion in Arrest of Judgment (see, also, Public officers C c 1, criminal law I k 2).

a Nature and Grounds in General

1. A motion to arrest a judgment in a criminal action will be allowed only where some fatal error or defect appears on the face of the record, and not where the motion is based upon a variance between the indictment and proof, or want of evidence to support the verdict. *S. v. McKnight,* 259; *S. v. Grace,* 280.

CRIMINAL LAW—*Continued.*

K Judgments (for abandonment see Husband and Wife A d).

a Conditional or Alternative Judgments

1. Where the husband has been convicted of wilfully abandoning his wife and minor children (C. S., 4447); and, secondly, of wilfully failing to support them (C. S., 4450), an order suspending judgment upon the second count, to take effect, however, upon the defendant's failure to comply with the order for support under the first one, is not objectionable as being conditional or alternative. *S. v. Vickers*, 239.

b Suspended Judgments

1. Where the defendant has been convicted of slandering a virtuous woman and judgment has been suspended upon certain conditions, before the suspended judgment can be put into execution for the failure of defendant to perform the conditions thereof he must be given an opportunity to be heard, and on appeal the judge should find the facts upon which he acted in putting the judgment into effect. *S. v. Smith*, 438.

c Costs

1. The taxing the cost in a criminal action is not a part of the punishment for the offense committed, and is regulated by statute. C. S., 1268, 1270. *S. v. Smith*, 438.

L Appeal and Error in Criminal Cases.

a Prosecution of Appeals under Rules of Court

1. An appeal *in forma pauperis* by a defendant convicted of a capital felony will be docketed and dismissed on motion of the Attorney-General when not prosecuted as required by the rules of Court regulating appeals, after an examination of the record for errors appearing on its face. *S. v. Newsome*, 16.

d Record

1. Where the record does not disclose that a verdict has been rendered on an offense charged or how the case was constituted in court, the action will be dismissed in the Supreme Court on appeal. *S. v. Beasley*, 797.

e Review

1. Where material evidence admitted on the trial of a homicide should have been excluded, a new trial will be granted in the Supreme Court on appeal. *S. v. Carr*, 129.

2. Upon appeal the immateriality of error must clearly appear upon the face of the record for the Supreme Court to find it harmless. *S. v. McLeod*, 542.

CUSTOMS AND USAGES.

A Establishment and Proof of Customs.

a Evidence

1. An observed custom prevaling at the time of the sale and delivery of goods may be shown by parol as an unwritten part of a contract the law does not require to be in writing, when not contradictory of the written part. *Crown Co. v. Jones*, 208.

DAMAGES (Motion to set aside verdict for excessive damages see Appeal and Error J b 3).

E Punitive Damages.

a Grounds Therefor

1. Where there is no evidence that the injury caused the plaintiff by a deleterious substance in a bottled drink was caused maliciously or by wanton negligence or in a spirit of mischief or criminal indifference to civil obligations, punitive damages may not be recovered by him. *Perry v. Bottling Co.*, 690.

c Evidence of Financial Worth of Defendant

1. Where punitive damages are not recoverable upon the pleadings, evidence as to the financial worth of the defendant is incompetent. *Edwards v. Finance Co.*, 462.

F Measure of Damages (for negligence in delivery of telegram see Telegraph Companies A d—for diverting surface waters see Waters and Water Courses C. b).

a Injuries to the Person

1. Permanent damages recoverable for the negligent act of another is the present net value of the difference between what the plaintiff would have earned and what he is able to earn in his present condition, taking into consideration his expectancy of life by the mortuary table, affected by evidence of his health, etc., immediately preceding the injury. *O'Brien v. Parks Cramer Co.*, 359.

b Breach of Contract

1. Where the seller contracts to deliver lumber for an indefinite time at a certain price at the place of delivery, upon the purchaser's breach of his contract to receive and pay for it, the seller may recover the difference between the contract price and the fair market value of the lumber at the place of delivery, taking the fair market value at the time of the breach and not at the date the future deliveries would have been made, and an instruction that he could recover the difference between the market price and the value of the lumber undelivered, without deducting the cost of delivery, is erroneous. *McCall v. Lumber Co.*, 598.

DEADLY WEAPON see Homicide D a 1.

DEATH (Death by negligent act and liability therefor see Negligence, Railroads, Master and Servant).

A Evidence and Proof of Death.

a Presumption of Death after Seven Years Absence

1. Sufficient evidence of presumptive death under the common law takes the question of the death to the jury in rebuttal of the presumption that the person is yet alive. *Steele v. Ins. Co.*, 408.
2. The doctrine of the common law as to presumptive death is not repealed or affected by statute, and obtains in our courts. C. S., 970. *Ibid.*

DEATH—*Continued.*

B Action for Wrongful Death.

a Limitation of Time for Bringing Action, Summonses and Discontinuance

1. The requirement that a suit to recover damages for a wrongful death shall be brought within one year is a condition annexed to the right of action and it must be shown by the plaintiff that he has complied therewith, C. S., 160, and it is not necessary for the defendant to plead it as a statute of limitations. *Neely v. Mines,* 345.

2. Where there is a break in the continuity in the issuance of alias and pluries summonses in a civil action to recover damages for a wrongful death there is a discontinuance, and service of a summons thereafter commences a new action, and if issued more than one year after the wrongful death the action will be dismissed. *Ibid.*

3. The requirements that the plaintiff must bring his action for wrongful death within one year and issue alias and pluries summonses when the original has not been served as the statutes direct, applies where the defendant is a nonresident. *Ibid.*

c Damages, Expectancy of Life, Mortuary Tables. (Damages in action for wrongful death not available to creditors see Executors and Administrators B a.)

1. The statutory mortuary tables is but evidentiary and not conclusive evidence of the expectancy of life at the various ages stated. C. S., 1790. *Young v. Wood,* 435.

DECEDENT—Communication with, see Evidence D b.

DEEDS AND CONVEYANCES (Estoppel by deed see Estoppel A—Deeds to right of way see Railroads C a—Cancellation of deeds see Cancellation of Instruments—Tax deeds see Taxation H c).

A Requisites and Validity.

f Acknowledgment and Probate

1. Where a deed in the chain of title of the plaintiff bears the certificate of the clerk of the court of the county of its registration that the instrument has been properly proved as appears from the foregoing seals and certificates, the presumption is against the defendant's contention to the contrary, and the validity of the deed will be upheld when it has been duly acknowledged before a notary public in due form, but not attested by his notarial seal, C. S., 3179, 3297, and, *Held,* no prejudicial error when the parties plaintiffs to the action are grantors and grantees in the deed. *Peel v. Corey,* 79.

2. In order to a valid probate of a deed to lands before a justice of the peace by an attesting witness, the witness must be sworn and his evidence taken by the probate officer as his judicial or *quasi*-judicial act. *McClure v. Crow,* 657.

3. Where the probate of a deed is fatally defective on its face as to the examination under oath of a subscribing witness, it is not open to proof as against the rights of an innocent subsequent purchaser that in fact the witness was examined by the probate officer, under oath, so as to show that in fact the witness was examined as the statute requires. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

B Recording and Registration.

a Registration as Notice

1. In order for a registered deed to give constructive notice to creditors or purchasers for value, the probate must not be defective upon its face as to a material requirement, and where the probate is taken upon the examination of an attesting witness it must actually or constructively appear upon the face of the probate that the certificate was made upon evidence taken of the subscribing witness under oath, and if not so appearing the registration of the deed is insufficient to give the statutory notice. C. S., 3309, 3293. *McClure v. Crow*, 657.

C Construction and Operation.

a General Rules of Construction

1. A deed must be construed as a whole so as to effectuate the intent of the parties as expressed in the whole instrument, and to this end apparent repugnancies will be reconciled, when possible by a fair and reasonable interpretation, and words may be transposed. *Lee v. Barefoot*, 107.

c Estates and Interests Created

1. Where in the premises of a deed land is conveyed to B. and his heirs, and later "it being the intention of the grantor to convey to B. and his wife, C., an estate during their natural lives or the life of the survivor, to their use and benefit without punishment," with remainder over to their children, and in the habendum "to have and to hold . . . to B., his heirs and assigns to their only use and behoof forever" shows the intention of the parties to convey to B. and wife a life estate, and this intention will be given effect by a fair and reasonable construction, and the apparent repugnancy can be reconciled by construing the deed as conveying to B. for the use of himself and wife a life estate by entireties, the use being executed, with remainder over to the children in fee. *Lee v. Barefoot*, 107.

2. Where a party is given a life estate by deed, "then the said land or any part thereof is intended to belong in fee simple to the children" does not give the holder of the life estate the right of alienation. *Ibid.*

3. Under a deed of lands to a mother and children, after the reservation of a life estate in the grantor, the grantees take as tenants in common in remainder as of the time of the execution of the deed, and the children born of the mother during the continuance of the life estate or thereafter are excluded. In this case there was no child *in ventre sa mere* at the date of the deed. *Cunningham v. Worthington*, 778.

f Conditions and Covenants

1. Under the provisions of a deed to lands to a son from his parents, reserving a life estate in the grantors, that a certain amount of money be paid to the grantors' other children in six months after the grantors' death: *Held*, the grantee in accepting the deed is bound by its provisions and covenants. *Peel v. Peel*, 782.

DEEDS AND CONVEYANCES—*Continued.*

g Restrictions

1. Under a restriction in a deed that only one residence should be erected in a land development, the erection of an apartment-house will not be enjoined when it is inequitable to do so owing to the growth of the city around the *locus in quo* and the erection of stores and other business buildings surrounding it. *Stroupe v. Truesdell*, 303.

2. A restrictive covenant in a deed that only residences or dwelling-houses shall be erected in a scheme for developing a large area of lands, subdivided into lots, including the lot in question, does not exclude apartment-houses from being erected thereon. *Stroupe v. Medernach*, 305.

D Boundaries.

a Courses and Descriptions

1. Where parol evidence is necessary to identify lands described in a deed, descriptive words should be construed to effectuate the intent of the parties, and where there is a discrepancy between the course and more certain descriptions, the latter will prevail. *Lee v. Barefoot*, 107.

2. What lines constitute the boundaries of land described in a deed is a question of law for the judge; where the lines are is a question of fact for the jury under correct instructions based on competent evidence. *Ibid.*

b Establishment by General Reputation

1. Where the location of some of the lines and boundaries of lands is sought to be established by reputation, the declarations must have their origin at a time comparatively remote, *ante litem motam*, and should attach themselves to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some fixed and definite location, and the declarant must also have been disinterested at the time of making the declarations and dead at the time they are offered in evidence. *Peltz v. Burgess*, 395.

E Pleading and Evidence.

a Parol Evidence Affecting Deeds

1. Where title to land depends upon the sufficiency of the description, the deed will be upheld if possible, and unless the description is so vague and contradictory that it cannot be told what thing in particular is meant, parol evidence is admissible to identify the land, and a finding of fact, in an action for partition, that the deed in the instant case is not void for uncertainty of description is upheld under the facts of this case. *Lee v. Barefoot*, 107.

F Timber Deeds.

b Renewal of Right to Cut Timber

1. Where the evidence is conflicting as to whether the price for an extension of time for the cutting and removing timber from lands under the provisions of a timber deed has been tendered and issue is raised for the determination of the jury, a motion as of nonsuit thereon will be denied. *Carroll v. Batson*, 168.

DEEDS AND CONVEYANCES—*Continued.*

c Rights of Parties Under Mortgage and Foreclosure of Land on Which Right to Cut is Granted

1. Where a grantor of lands reserves the right to timber thereon for a period of five years with the right of renewal thereof at expiration upon payment of a stipulated amount, and then sells the timber reserved according to this agreement, and the grantee of the lands mortgages the same, and the mortgage is foreclosed: *Held*, the purchaser at the foreclosure sale acquires title to the land, and to the timber thereon subject to the timber deed, and when no tender of the stipulated amount for renewal is made before the expiration of the five years he may enjoin further cutting of timber by the grantee in the timber deed. *Carroll v. Batson*, 168.

DEFAULT—Judgment by, see Judgments D a.

DESCENT AND DISTRIBUTION (Statutes governing where deceased resident of another state see Evidence I a).

A Nature and Course in General.

a Construction as to Whether Estate is Taken by Descent or by Purchase

1. A grandson of the devisor of lands does not take lands by descent from him when his father is living at the time of his grandfather's death, even though he takes the same lands and interest under the devise that he would have taken under the descent had his father not been living, and he acquires a new estate by purchase, descendable to his heirs at law under the canons of descent. C. S., 1654, Rules 4, 5, 6. *Peel v. Corey*, 79.

B Persons Entitled and Their Respective Shares. (After-born children see Wills E e—Upon death of beneficiary see Insurance N a.)

a Evidence and Proof of Relationship to Deceased

1. Upon the issue as to whether the plaintiff was the half sister of the intestate and therefore entitled to a distributive share of the estate, testimony of one, in a position to know, that the deceased and the father of the plaintiff affirmed and regarded themselves to be father and son, is competent evidence upon the issue. *Howard v. Faison*, 206.

C Rights and Liabilities of Heirs and Distributees.

a Debts of Intestate and Encumbrances on Property

1. After the death of a deceased intestate mortgagor, his heirs at law take his lands only when there is a sufficiency of his estate to pay his debts, and where the mortgage has been foreclosed in accordance with the power of sale contained in the instrument and a deed made to the purchaser, the heirs at law, to be entitled to have the deed set aside for irregularity of sale, must show a sufficiency of assets to pay creditors in order for them to recover the land, and an issue aptly tendered to establish the necessary facts under the evidence, when refused by the court, entitles the grantee in the deed to a new trial. *Jessup v. Nixon*, 33.

DISCOVERY see Bill of Discovery.

DISCRETION OF COURT—Review of, see Appeal and Error J b—to order inspection of writing see Bill of Discovery C a.

DIVORCE (Annulment of marriage see Marriage C).

B Grounds.

a Adultery and Evidence of Adultery

1. In an action against the wife for absolute divorce, evidence that she was given to profanity and evidence by a court record that her sister was arrested for disorderly conduct is irrelevant and incompetent upon the issue of adultery. *Hill v. Hill*, 472.

DUE PROCESS OF LAW see Constitutional Law I.

DURESS—in execution of Bills and Notes see Bills and Notes A f.

EDUCATION see Schools and School Districts.

EJECTMENT—Adverse Possession as defense see Adverse Possession—Estoppel by deed see Estoppel A.

ELECTION see Wills F b.

ELECTION OF REMEDIES.

A When Election May or Must Be Made. (See, also, Insurance P a, Arbitration and Award A a 1.)

1. A party may not elect his remedy and sue upon a contract and thereafter bring an action to rescind the contract for fraud in the procurement. *Hawkins v. Carter*, 538.

2. A purchaser of a lot in a scheme for the development of a large tract of land is put to his election to rescind the contract for fraud within a reasonable length of time after the discovery of fraud, or to affirm it by accepting its benefits and by making payment on the purchase price and paying interest when it becomes due, but it is not alone a sufficient affirmance of the contract under circumstances wherein it will appear that this was done without knowledge, actual or constructive, of the fraud practiced upon him. *Clark v. Laurel Park Estates*, 624.

ELECTIONS.

G Conduct of Elections.

a Ballots, Ballot Boxes, and Mode of Voting

1. The provisions of Article VI, section 6, of the State Constitution that all elections by the people shall be by ballot and all elections by the General Assembly shall be *viva voce* implies that in elections by the people the ballot shall be a secret one. *Withers v. Comrs. of Harnett*, 535.

2. By providing a ballot box for an election, with two separate slots in which the ballots are to be deposited, each plainly marked so as to indicate whether for or against the measure, in the presence of those favoring or opposing the measure, the secrecy of the ballot is not maintained in accordance with the mandate of our State Constitution, Art., VI, sec. 6, though the box itself has no partition to separate the ballots which are commingled for the count. *Ibid.*

ELECTIONS—*Continued.*

3. The privacy of voting at an election of the people is a personal privilege given to each voter. *Ibid.*

4. A voter at an election does not waive his constitutional right to a secret ballot, Const., Art. VI, sec. 6, by not protesting, unless he has been made aware of his rights under the facts and circumstances of the balloting. *Ibid.*

5. It is not necessary to show undue influence or intimidation for the courts to declare an election void when the voters have been deprived of their right to a secret ballot. Art. VI, sec. 6. *Ibid.*

ELECTRICITY.

A Duties and Liabilities in Respect Thereto.

c. Duty to Repair and Liabilities for Negligent Injury

1. The doctrine of *res ipsa loquitur* applies when the evidence discloses that the plaintiff's intestate, a thirteen-year-old boy, was killed by a deadly voltage of electricity from a wire fence, with further evidence that the wire fence was charged by an induced current caused by a heavily charged transmission wire coming in close proximity thereto. *Murphy v. Power Co.*, 484.

2. Evidence tending to show that the plaintiff's intestate, a lad thirteen years of age, and being where he had a right to be, was killed by a high voltage of electricity from the defendant's transmission wire, that the defendant had been notified in time to cut off the current, which under the circumstances could have been done in a very short time, and the injury, subsequently occurring, could have been thus avoided, is sufficient to take the case to the jury upon the actionable negligence of the defendant in causing the death, and under the facts of this case, contributory negligence does not arise. *Ibid.*

3. Where there is evidence tending to show that the plaintiff's intestate was killed by catching hold of a wire fence to which a high voltage of electricity has been transmitted by induction from a heavily charged wire of the defendant negligently coming in close proximity with it, that the intestate was badly burned on his hands and body with other evidence of burning along the fence: *Held*, not prejudicial error to defendant for plaintiff's witness to testify that as defendant's employees were finishing making the place safe he told them in response to their inquiry that if they had heard it "popping and cracking" they would have thought it had burned much, there being other evidence to that effect. *Ibid.*

EMBEZZLEMENT.

B Indictment Therefor.

a Proof and Variance

1. The crime of embezzlement rests upon statute alone, and conviction thereof under an indictment drawn under C. S., 4268, when the evidence tends only to show a violation of C. S., 4270, is erroneous upon the ground that the proof is at variance with the offense charged in the bill. *S. v. Grace*, 280.

EMINENT DOMAIN (Due process see Constitutional Law I, Personal civil liability of road officials see Municipal Corporations D d 1).

A Nature and Extent of Power.

a Public Use

1. The provisions of our statute for the acquisition of lands for a national park affects the interest of the people of the State, and though local as to location, is for a public use in contemplation of its acquisition by the State for the purpose outlined in the act. Const., Art. II, sec. 29. *Yarborough v. Park Commission*, 284.

2. The terms "public use" applied to the taking of private lands under condemnation is one for the ultimate determination of the courts in particular instances, and where so established that the use is public, the expediency or necessity for establishing the use is exclusively for the Legislature, subject to the restraint that just compensation shall be made. *Ibid.*

B Delegation of Power.

a North Carolina National Park Commission. (See, also, Constitutional Law D c 1.)

1. The North Carolina National Park Commission is an agency of the State created by statute, vested with the power of eminent domain, and not subject to the limitations provided in C. S., 1714, 1715. *Yarborough v. Park Commission*, 284.

2. The act creating the National Park Commission makes the commission an agency acting for the State to acquire lands for the establishment of the national park, and to vest the title in the State, and the position that a statute cannot confer on the Federal Government the right of condemnation is not affected by the further provision of the statute that the State may cede the lands so acquired to the Federal Government in consideration of the public interest of the people of the State in the establishment of the national park. *Ibid.*

C Compensation.

a Necessity and Sufficiency in General

1. The act incorporating the North Carolina National Park Commission in effect provides that the lands of private owners taken for its purpose shall not be acquired until an adequate sum is available for payment for the lands taken, and a restraining order will not issue upon the assumption that the landowners cannot be ultimately paid under this and other provisions of the act. *Yarborough v. Park Commission*, 284.

EMPLOYER AND EMPLOYEE see Master and Servant.

EQUITY—Equitable estoppel see Estoppel C—Specific Performance see Specific Performance—Injunctions see Injunctions—Bill of Discovery see Bill of Discovery—Sale of Infants property see Infants A a.

ESTATES—Life estates see Life Estates—Estates created by wills see Wills E d, E b, by deeds see Deeds and Conveyances C c—Acquired by descent and distribution see Descent and Distribution.

ESTOPPEL (By judgment see Judgments M).

A By Deed (Purchaser of equity of redemption estopped to deny validity of mortgage assumed by him see Mortgages F b 2).

a Creation and Operation in General

1. Where the defendant's title is derived by mesne conveyances under a grant he is estopped to deny the validity of the plaintiff's title under the same grant on the ground that it lacked a seal. *Power Co. v. Taylor*, 55.

C Equitable Estoppel (See, also, Wills F d—Agency by estoppel see Principal and Agent C a).

b Grounds of Estoppel

1. Where an incorporated city or town has for a long period of time occupied a part of a railroad right of way as a city street, and the railroad company has previous notice that the municipality would put permanent improvements upon the street and assess the abutting owners thereon, the railroad company may not wait until after the improvements are made and then successfully resist the payment of the assessment against the property on the ground that the municipality was not the owner of the street, the doctrine of equitable estoppel applying. *In the Matter of Assessment Against R. R.*, 756.

EVIDENCE (Objections and exception to introduction of evidence see Trial B—Evidence in criminal cases see Criminal Law G, of adultery see Divorce B a, Abduction B—Recent possession as evidence of Burglary see Burglary C a—of partnership see Partnership A c—of adverse possession see Adverse Possession C b—of transfer of note see Bills and Notes B a 1—of knowledge of fraud before transfer see Bills and Notes C d—of Customs and Usages see Customs and Usages—of negligence of railroads see Railroads D b, of master see Master and Servant C, of power companies see Electricity A, in obstructing streets see Municipal Corporations E c, in use of highway see Highways B—of relationship of heir to deceased see Descent and Distribution B a—in action on check see Bills and Notes I a—of forgery in signature to will see Wills D h 1—Verification of complaint as evidence in proving account see Account, Action on C a—Bill of discovery see Bill of Discovery—in action for injuries from foreign substances in bottled drink see Food A a 2—of financial worth of defendant on issue of punitive damages see Damages E c).

C Burden of Proof (in action on Note see Bills and Notes H a—in claim and delivery see Replevin D a—of assumption of risks see Master and Servant C f 4—of lost instrument see Lost Instruments A a).

a General Rules

1. The correct rule of law as to the burden of proof is a matter of substantial right to the party who has been prejudiced thereby. *Vandiford v. Collins*, 237.

b Defenses

1. In an action to recover upon a note secured by a title retaining contract of sale, where the defense is that the amount was raised after execution and delivery, the burden is on the defendant to show this by the greater weight of the evidence, and a charge is erroneous

EVIDENCE—*Continued.*

that he must prove his defense by clear, strong and convincing proof, or find the issue for the plaintiff, as placing on defendant a greater burden than the law requires of him. *Ibid.*

c Interveners

1. The invervener in an action becomes the actor therein and has the burden of establishing his rights set up by him. *McKinney v. Sutphin*, 319.

D Relevancy, Materiality and Competency in General (photograps as evidence see Master and Servant C b 17).

a Res Gestæ

1. The declarations of a party immediately after an accident are not admissible in evidence as a part of the *res gestæ* when it appears that the declaration was a narration of past occurrence rather than the facts talking through the party. *Batchelor v. R. R.*, 85.

b Transactions or Communications With Decedent or Lunatic

1. A transaction or communication with a deceased person prohibited by C. S., 1795, does not include those with a living person interested in the result of the action. *White v. Mitchell*, 89.

2. Where a widow is entitled during her widowhood to the profits on the land devised by her deceased husband, but not to his moneys commingled therewith in a deposit in a bank, and has died devising the total amount of the deposit: *Held*, testimony as to her receipt of the money from the crops is competent, not falling within the provisions of C. S., 1795, and does not affect the title to other money owned by her husband at his death and given to her for life by his will. *Ibid.*

I Documentary Evidence.

a Statutes of Other States

1. Where the United States government has paid into a court of this State the proceeds from a policy of War Risk Insurance on the life of deceased soldier, and from the record it is inferable that the deceased soldier was a resident of another State at the time of his death, but not stated with sufficient certainty, the case will be remanded, as the law of the State in which he died domiciled will control the question of descent and distribution involved in the case, of which statute the courts here will not take judicial notice, and it is required that the statute be properly proven, if applicable. *In re Estate of Pruden*, 69.

J Parol or Extrinsic Evidence Affecting Writings (Affecting deed see Deeds and Conveyances E a).

a Explaining, Modifying, or Varying Terms of Written Instrument

1. Where a letter ordering goods specifies the number and kind or the articles, and is accepted by the seller's letter, it may be shown by the purchaser in the seller's action to recover the contract price, that the order was based upon a previous verbal contract that the goods were to be paid for only as and when ordered, as an unwritten and uncontradictory part of the entire contract. *Crown Co. v. Jones*, 208.

EVIDENCE—*Continued.*

2. In this action to recover profits prevented by the alleged breach of contract by a county for the construction of a public highway: *Held,* the written contract was sufficiently ambiguous to admit of parol evidence not contradictory thereof, and that plaintiff was estopped by accepting final payment thereunder. *Hughes & Ray v. Mitchell County,* 343.

3. Where a written contract is sued on, it may be shown in defense by parol in contradiction thereof that the writing was to be effective only upon certain contingencies which had not happened, or to show a different method of payment, or where a modification has been made after the execution of the writing, providing the matters resting in parol are not required by law to be in writing. *Roebuck v. Carson,* 672.

4. Where notes in series are to mature at different specified dates, fully stating the amounts of each and the interest to be paid thereon, a contemporaneous oral agreement that upon the payment of a certain bonus the notes were to run for the lifetime of the maker is in contradiction of the notes as written, and may not be set up as a defense to an action on the notes. *Ibid.*

K Expert Testimony.

a Conclusions and Opinions of Witnesses in General

1. *Martin v. Hanes,* 189 N. C., 644, cited and approved as to expert testimony upon hypothetical questions. *Tate v. Parker,* 499.

b Subjects of Expert Testimony

1. In this case *Held,* evidence of one speaking from his own knowledge and experience that "fore-poling" the work on an "air course" would have prevented the injury to the plaintiff's intestate, was not objectionable as a nonexpert opinion upon the facts of this case, or as testifying upon the issue as within the exclusive province of the jury to decide. *Street v. Coal Co.,* 178.

c Qualifications and Competency of Experts

1. Where a witness has testified as an expert, a general exception to his testimony will not be upheld upon the ground that the court has not ruled upon the question of his qualification as an expert, when he has not been requested to do so by the objecting party. *S. v. Corriher,* 397.

L Evidence at Former Trial or in Other Proceedings.

a Admissions of Record in Former Trial

1. A solemn admission put in record by the attorneys of a party are admissible in evidence against him in a subsequent action brought by him against a third party when the second action involves the same question. *Hotel Corp. v. Dixon,* 265.

M Character Evidence.

a General Rules Governing Admissibility

1. In an action against the wife for absolute divorce, testimony on direct examination that she was guilty of profanity is incompetent as character evidence as being evidence of specific misconduct, and not as to her general reputation. *Hill v. Hill,* 472.

EXAMINATION OF ADVERSE PARTY see Bill of Discovery B.

EXECUTION.

E Stay, Quashing, Vacating, and Relief Against Execution.

a Restraining Further Proceedings After Sale Under Void Judgment

1. In an action to declare a sale of land under execution of judgment void, the remedy of restraining further proceedings under the sale is by motion in the original cause, and a separate action for a restraining order is unnecessary. *Weir v. Fowler*, 270.

G Execution Sales.

a Manner, Conduct, and Validity of Sale

1. The sheriff at the sale under execution of a judgment must conduct the sale in a prudent and just manner so as to realize a fair price for the property thus sold, or the sale will be voidable upon motion in the cause made by a party whose rights are thereby affected. *Weir v. Weir*, 269.

2. The mere fact that the property sold at an execution sale was *en masse*, or that the price it brought was inadequate, will not suffice in equity to set the sale aside in the absence of allegations and proof of elements of fraud, unfairness, oppression, or undue advantage on the part of the sheriff or purchaser at the sale. *Ibid.*

3. Where property is sold under execution of a judgment, gross inadequacy of price may be considered in equity with other evidence of fraud or unfairness in the sale, though standing alone it is insufficient for the interference of the courts. *Ibid.*

4. An execution sale, when closed, is not subject to an upset bid, C. S., 2591, 3243 not being applicable thereto. C. S., 671. *Ibid.*

EXECUTORS AND ADMINISTRATORS (Right to recover costs see Costs A a—Right to bring action to construe will see Wills E i 1).

A Appointment, Qualification, and Tenure.

b Appointment Not Subject to Collateral Attack

1. The appointment of an administrator by a court of competent jurisdiction, where the death of the intestate is admitted, and fraud is not alleged, is not subject to collateral attack, but the validity of the appointment can be questioned only by a direct proceeding. *Hines v. Foundation Co.*, 322.

c Conflict in Appointment of Administrator by Different Courts, Rights and Priorities

1. Where, in an action to recover for wrongful death, it appears that an administrator has been appointed under the laws of South Carolina after full notice to all of the distributees and heirs at law of the deceased, and that the administrator so appointed has made a compromise and settlement, and thereafter upon allegation that the deceased was a resident of this State, an administrator had been appointed here: *Held*, under the full faith and credit clause of the Federal Constitution, Art. IV, sec. 1, the compromise effected by the administrator duly appointed under the laws of South Carolina will operate as an estoppel in an action brought here by the administrator appointed in North Carolina, in the absence of allegations of fraud, unfairness or injustice. *Hines v. Foundation Co.*, 322.

EXECUTORS AND ADMINISTRATORS—*Continued.*

2. Upon the question of whether an administrator has been first appointed in the jurisdiction of our court or in that of another State is determined by the time of the application of letters testamentary, whether first in this State or in the other State. *Ibid.*

B Assets, Appraisal, and Inventory.

a Assets Not Available to Creditors

1. Damages for a wrongful death are not assets of the estate available to creditors, and are to be disposed of according to the canons of descent and distribution. C. S., 160, 161. *Hines v. Foundation Co.*, 322.

D Allowance and Payment of Claims (Limitation of action for services rendered see Limitation of Actions C a 1).

a Liabilities of Estate

1. A testator may not so dispose of his estate as to avoid the payment of his debts in accordance with the priorities fixed by statute. C. S., 93. *Trust Co. v. Lentz*, 398.

2. Where the plaintiff declares upon an express contract with defendant's intestate she is not precluded from recovery upon *quantum meruit* for services rendered three years before intestate's death when the evidence supports the claim and there is no relationship between the decedent and the plaintiff to raise the presumption that the services were gratuitously rendered. *Edwards v. Matthews*, 39.

3. In order to a valid contract it is required by law that the minds of the contracting parties come definitely together upon its subject-matter; and when one unrelated to the testator brings action against the executor of the testator to recover for services rendered under an express contract, evidence of such contract is insufficient to be submitted to the jury that tends only to show that testator had expressed to third persons his intention to leave the plaintiff by will an amount in value or money that would more than repay him for the services he had rendered. *Brown v. Williams*, 249.

4. While services performed by members of the decedent's family by certain of its members are ordinarily presumed to have been given gratuitously, and therefore an action against the personal representative upon a *quantum meruit* may not be maintained, it is otherwise when the plaintiff in the action is unrelated to the decedent, and the law will imply a promise to pay for the value of such services when a definite compensation has not been fixed by contract between the parties. *Ibid.*

5. In proper instances one performing valuable services to the deceased may recover for their value for three years preceding his death upon a *quantum meruit*. *Ibid.*

e Order of Affecting Assets for Payment

1. While the law fixes the primary liability for the payment of the testator's debts upon the personal property, the testator may by the terms of his will charge specific devises or bequests with the payment of designated debts, and exempt his personal property from the primary burden of paying such debts. *Trust Co. v. Lentz*, 398.

EXECUTORS AND ADMINISTRATORS—*Continued.*

2. Where a testator has devised separate portions of his lands to designated children and to his wife in lieu of dower, and his business to certain of his children upon condition that they pay the indebtedness that may be outstanding against it, and also has annexed a like condition to the other specific devises and bequests, and it is made to appear that the liabilities of the business greatly exceed its assets, equity will charge payment of the debts upon the other estate left by the testator, observing the intent of the testator in regard to the apportionment to be charged against the various interests to be taken by the other beneficiaries. *Ibid.*

3. Where the testator has specifically devised to certain of his children designated portions of his estate under certain conditions as to the payment of his debts, and also to his wife a life estate in certain of his other lands under like conditions in lieu of dower, and in equity both of these estates are chargeable with debts which would not otherwise be paid: *Held*, the widow stands on a parity with the others in this class, and they are entitled to equality of contribution as among themselves, which in a proceeding by the executor involving this question, he is not required to adjust. *Ibid.*

F Sales and Conveyances Under Order of Court.

a Amount of Land Necessary to Sell

1. In proceedings to sell lands of decedent to make assets to pay debts, the question of the necessity to sell all of decedent's land becomes immaterial and academic as affecting the title of the purchaser at the sale when all the parties in interest have joined in the request that all of the lands be sold. *Parker v. Dickinson*, 242.

EXEMPTIONS—property exempt from taxation see Taxation B d.

EXPERT TESTIMONY see Evidence K—in criminal actions see Criminal Law G i.

EXTRADITION.

A Proceedings and Formal Requisites for Extradition.

a Warrant of the Governor of the Asylum State

1. Where the governor of one state receives the requisition for a fugitive from another state who has violated the criminal laws of the latter state, it is his duty to issue a warrant of arrest for the fugitive if the requisition papers are in proper form. Art. IV, sec. 2, Federal Constitution; U. S. Revised Statutes 1918, sec. 10126. *In re Veasey*, 662.

2. The warrant of the governor of the asylum state for the arrest of one for extradition should disclose upon its face that a demand has been made by the governor of the demanding state for the party in custody as a fugitive that the demand was accompanied by a copy of the indictment or affidavit charging him with the commission of the crime within the demanding state; that the copy of the indictment or affidavit was certified as authoritative; that the person demanded is a fugitive from justice. *Ibid.*

EXTRADITION—*Continued.*

B Grounds Therefor and Defenses.

a Charge of Crime and Fugitive from Justice

1. One who is sought to be extradited may contest the validity of the extradition proceedings on writ of *habeas corpus* by showing as a matter of law from the requisition papers and the accompanying indictment and affidavit of the demanding state that he is not charged with a crime in the demanding state; and also as a matter of fact to be determined by the evidence that he is not a fugitive from justice therefrom. *In re Veasey,* 662.

b Innocence of Crime Charged

1. One whose extradition is sought may not resist the extradition by proof in *habeas corpus* proceedings of his innocence of the offense charged. *In re Veasey,* 662.

FALSE PRETENSE.

A Elements and Nature of the Crime.

b Deception and Damages

1. The seller of merchandise may not be convicted of procuring the sale by false pretense when the buyer acted independently in having the articles examined and agreed upon a lower price than the one first offered by the seller and knowingly concluded the contract upon that basis, one of the essential elements of the crime being lacking to create the offense, that the false representations must actually deceive and defraud the buyer. *S. v. Mayer,* 454.

FAMILY CAR—husband's liability for wife's driving see Husband and Wife B a—Parent's liability for child's driving see Parent and Child A a.

FEES see Attorney and Client D.

FERTILIZER see Agriculture C.

FLIGHT—as evidence of guilt see Criminal Law G g.

FOOD.

A Liability of Manufacturer for Injury to Consumer.

a Deleterious and Foreign Substances (Punitive damages therefor see Damages E a 1)

1. An action against a bottling company for damages caused by foreign and deleterious substances contained in the drink sold is one for negligence, and the doctrine of *res ipsa loquitur* does not apply upon the finding of such foreign substances, but negligence need not be proved directly, but may be inferred by relevant acts and circumstances. *Perry v. Bottling Co.,* 175; *Lamb v. Boyles,* 810.

2. When the plaintiff has offered evidence tending to show that a bottle of coca-cola purchased by him contained shivered glass which caused him injury, it is competent for him to introduce evidence that other bottles of coca-cola sold to others, bottled by the defendant about the same time, contained foreign and deleterious substances, as evidence tending to show defendant's actionable negligence. *Perry v. Bottling Co.,* 175.

FOOD—*Continued.*

3. Where there is evidence in an action against a bottling company of deleterious substances in a bottled drink that caused injury to the plaintiff in drinking the contents, evidence that deleterious substances had been found in other drinks bottled by the same company, under substantially the same conditions, is admissible as corroborative evidence of the plaintiff's theory that the presence of glass in the bottle which he purchased was not an unforeseeable contingency. *Perry v. Bottling Co.*, 690.

FORCIBLE TRESPASS.

B Criminal Responsibility.

a Nature and Elements of Crime

1. The offense of forcible trespass under C. S., 4300, does not involve title to the premises, but is directed against the possession, and when the possession is in the prosecuting witness, and the entry is made in such a manner with such show of force, after being prohibited by the prosecuting witness, as tends to a breach of the peace, it is sufficient for conviction. *State v. Earp*, 164.

FORECLOSURE see Mortgages H.

FORFEITURES—for failing to list evidence of debt for taxes see Taxation I a.

FRANCHISES see Municipal Corporations F.

FRAUD (Cancellation of instrument for fraud see Cancellation of Instruments A b—Rescission of contract for fraud see Contracts D a—Reformation of insurance policy for fraud see Insurance E c—Election of remedies in action on policy see Insurance P a—Election of Remedies see Election of Remedies—Fraud in suppressing existence of chattel mortgage see Chattel Mortgages G b 1).

A Deception Constituting Fraud and Liability Therefor.

b Duty to Read Instrument

1. A person who can read and is capable of understanding an instrument is generally required to read a paper before signing it unless he is induced not to do so by positive fraud or false representations made by the other party and relied on by him. *Cromwell v. Logan*, 588.

FRAUDS, STATUTE OF.

A Promise to Answer for Debt or Default of Another.

a Applicability and Defenses

1. Where one who is financially interested in a crop induces the landlord to part with his lien in order that the tenant might retain possession, and to sign an appeal bond of the tenant, and promises to save the landlord from harm thereon, and the landlord is required to and does pay the bond: *Held*, the release of the landlord's lien is sufficient consideration for the promise to save from harm, and the transaction does not fall within the provisions of C. S., 987, that a promise to pay the debt of another must be in writing. *Jennings v. Keel*, 675.

FRAUDULENT JOINDER see Removal of Causes C b.

GUARANTY.

B Construction and Operation.

a Debts Guaranteed

1. Where the stockholders give a written guaranty in stated amounts for the debts of the corporation, and the corporation is dissolved, and the manager of the corporation opens a business in another city under the same trade name, but in which the stockholders have no interest, the guaranty will not be extended to include the debts of the business thus operated, in the absence of some provision or stipulation clearly importing such extension. *Watts v. Gross*, 103.

HABEAS CORPUS—Right thereto in extradition proceedings see Extradition B a.

HEALTH see Cemeteries B.

HIGHWAYS.

A State Highway Commission (Surety bonds for construction of highways see Principal and Surety B b).

c Injunctions Against

1. The action of the State Highway Commission in building the highways and bridges of the State is of public interest 3 C. S., 3846(a), and equity will not enjoin them in this work when injury by flooding lands may probably result in the future, there being an adequate remedy to the landowners at law in the defendant's right to condemn under the statute applicable. *Greenville v. Highway Commission*, 226.

2. Equity will not grant injunctive relief against the continued construction of a highway by the State Highway Commission when the injury to adjoining lands is speculative and rests only in conjecture as to resulting damages. *Ibid.*

d Actions Against for Damages

1. The State Highway Commission is an unincorporated agency of the State, and an action sounding in tort will not lie against it, and the remedy, if any, is statutory only. *Greenville v. Highway Commission*, 226.

B Use of Highway and Law of the Road (Injuries caused by concurrent negligence of two drivers is joint tort see Parties B a).

a Right Side of the Road

1. Where damages are sought for the negligent driving of an automobile on the wrong side of the highway in violation of statute, evidence of this fact may be shown upon the trial by the tracks made by the automobile at the place, broken glass from the reflectors, and the blood of the person injured in the collision. *Goss v. Williams*, 213.

2. Where there was evidence that the plaintiff, desiring to pass a truck on the highway going in the same direction, blew his horn, and that the driver of the truck heard the signal, but instead of driving to the right of the center of the road to allow the plaintiff to pass on the left, drove to the left and stopped or came almost to a stop,

HIGHWAYS—*Continued.*

and that the plaintiff, thinking that the truck was going to stop, and having his car under control, attempted to pass on the right, when the truck suddenly turned to the right, forcing the plaintiff to turn to the right to avoid hitting the truck, causing the plaintiff's car to run off the embankment on the right of the road, resulting in the injury in suit: *Held,* the evidence should have been submitted to the jury upon issues of negligence, contributory negligence and damages. C. S., 2617. *Stevens v. Rostan,* 314.

b Intersections and Speed at Intersections

1. Under the provisions of C. S., 2598, as amended by chapter 148, section 1(p), Public Laws of 1927, where one public highway joins another but does not cross it, the point where they join is an intersection of public highways within the meaning of the statute. *Goss v. Williams,* 213.

2. Under the provisions of C. S., 2616, 2618, amended by Public Laws 1925, it is negligence *per se* for one to drive his automobile more than fifteen miles per hour in traversing an intersection of highways when the driver's view is obstructed for one hundred feet therefrom, and damages may be recovered for its violation when the proximate cause of the injury: *Held,* the amendment of 1927, reducing the distance from 100 feet to 50 feet has no retroactive or continuing effect. *Ibid.*

3. Where the plaintiff was not walking along the highway but ran out from behind another automobile near an intersection and was struck and injured by the defendant's car for which injury he seeks to recover damages in his action: *Held,* it is not reversible error for the trial judge to fail to charge the jury specifically upon the various particulars as to the speed, etc., required of the driver of an automobile upon the highway at a cross-road, if he charges correctly upon the general law arising from the evidence. C. S., 564. *Fisher v. Deaton,* 461.

d Degree of Care Required in Respect to Children on Highway

1. One driving an automobile upon a highway is not relieved of liability by the fact alone that a seven-year-old child ran before his automobile suddenly and without previous indication, for the law requires him to use due care, especially in regard to children, to avoid the injury between the time he saw, or by the exercise of proper care, he should have seen the child, and the time of the injury. *Goss v. Williams,* 213.

HOLOGRAPHIC WILLS see Wills C d.

HOMESTEAD.

A Nature, Acquisition, and Extent.

d Property in Which Homestead May Be Had and Laying Off Homestead

1. Where a mortgage on land is foreclosed and the land brings at the foreclosure sale a sum more than sufficient to pay the mortgage debt, the surplus remaining to the Constitutional limit of one thousand dollars is to be regarded as realty to which the homestead right attaches when the same has not been waived. *Farris v. Hendricks,* 439.

HOMESTEAD—*Continued.*

f Rights of Homesteader

1. Where the judgment debtor has executed a mortgage on his lands with the privy examination of his wife after the judgment has been docketed against him and the mortgage has been foreclosed and a sum of money in excess of that required to pay off the mortgage debt, and within the one thousand dollar exemption allowed by the Constitution, is obtained in the foreclosure sale and the surplus has been deposited in the office of the clerk of the court, which is the subject of the action between the judgment creditor and the judgment debtor claiming his homestead therein: *Held*, the latter is not entitled to the present worth of the *corpus* of the funds in the clerk's hands computed under the expectancy of life under the mortuary table, but only the interest thereon is available to him or to those who may claim the homestead under the provisions of the Constitution, Art. X, sec. 2. *Farris v. Hendricks*, 439.

B Transfer or Encumbrance.

a Right to and Requisites of Transfer

1. Where there is a homestead right in land, Const., Art. X, sec. 2, the homesteader may alienate the same only with the joinder and private examination of the wife. Const., Art. X, sec. 8. *Farris v. Hendricks*, 439.

HOMICIDE.

D Assault With Intent to Kill.

a Intent to Kill

1. Upon a trial of one charged with using a deadly weapon in inflicting a serious injury not resulting in death, C. S., 4214, an instruction that the use of such weapon raises a presumption of felonious intent is reversible error, the fact of murderous intent being for the State to prove. *S. v. Gibson*, 393.

E Excusable or Justifiable Homicide.

a Self-defense

1. Where the defendant on trial for homicide is without fault in bringing on the affray, and is assaulted with a pistol and is put in fear, and has reasonable grounds to fear, that his life will be taken or that great bodily harm would be inflicted and it reasonably appears to him to be necessary to kill the deceased to save his own life or to protect himself from great bodily harm, he is not required as a matter of law either to retreat or to withdraw from the combat, and his killing the deceased under these circumstances is excusable on the principle of self-defense. *S. v. Dills*, 457.

b Defense of Others

1. Where the husband and his wife are tried for murder in the second degree, and there is evidence that he fired the fatal shot in self-defense while his wife assisted him, an instruction that she must satisfy the jury that she fought in her own defense is reversible error when there is evidence, and the feme defendant contends that she was engaged in defending her husband. *S. v. Dills*, 457.

HOMICIDE—*Continued.*

G Evidence (Flight as evidence of guilt see Criminal Law G g).

a Weight and Sufficiency

1. Evidence tending to show that the defendant knocked the deceased down, jumped on her with both knees in her stomach, and choked her, resulting in peritonitis which caused death, *is held* sufficient. in an action of homicide, to deny defendant's motion as of nonsuit, and to sustain the jury's verdict of manslaughter. *S. v. King*, 50.

2. Where the evidence tends to show that the deceased, unarmed, came to the place where the defendants and others were fighting together, and in trying to pacify them he was turned upon by the defendants, and that the husband shot the deceased and killed him, while his wife joined in the assault with a stick, with further evidence of a previous encounter between the parties, and of motive: *Held*, the evidence that the assault on the deceased was a result of concerted agreement between the defendants, and that there was a preconceived purpose and joint assault was sufficient to take the case to the jury, and it was not error for the trial court to refuse to dismiss the action against the feme defendant. *S. v. Dills*, 457.

3. Evidence tending to show that the deceased was ravished by a person suffering from gonorrhea, and that she died from the assault and choking, with further evidence that the defendant had the disease and that his shoes fitted the tracks made at the time of the crime around the house of the deceased and at the place of the crime, is sufficient, taken with other evidence of guilt, to be submitted to the jury and to sustain their verdict thereon of murder in the first degree. C. S., 4643. *S. v. McLeod*, 542.

4. Evidence tending to show that the deceased was struck about the head with a weapon and thrown into a river, that the defendant had a motive for the crime, and that his automobile had blood spots on it at a place where a passenger therein bleeding from the head would leave blood spots, with evidence that an automobile similar to that of the defendant in which was a man who looked like the defendant was seen on the bridge from which the crime was committed and in the vicinity of the crime at about the time of its commission, that the automobile seen on the bridge made tracks at either end similar to the tread of the tires on the defendant's car, that when the defendant was asked about the crime he was nervous and made contradictory statements as to his knowledge of and relations with the deceased; that during the trial the defendant attempted suicide, together with other evidence of motive and identity: *Held*, the circumstantial evidence of defendant's guilt was sufficient to be submitted to the jury and to sustain their verdict thereon of murder in the second degree. *S. v. Lawrence*, 562.

HOSPITALS.

A Distinction Between Charitable and Private Hospitals.

1. A charitable hospital, in aid to its general charitable purpose, may, under certain circumstances, receive patients for pay without affecting its character as a purely charitable institution. *Johnson v. Hospital*, 610.

HOSPITALS—*Continued.*

B Charitable Hospitals.

a Liability to Patients

1. A charitable hospital corporation is held to due care in the selection of suitable surgeons and employees. *Johnson v. Hospital,* 610.

C Private Hospitals.

a Liability to Patients

1. A private hospital corporation operated for profit is held liable for damages to its patients resulting to them from the negligent, malicious, or wilful torts of its physicians and surgeons or other employees, occurring within the scope of their respective duties of employment. *Johnson v. Hospital,* 610.

2. Evidence tending only to show that a physician owned a large part of the shares of stock of a private hospital corporation, and was employed by the corporation only in certain specific cases, had a private office in the institution for his separate patients, and that the plaintiff in this action was not entered as a patient in the hospital and that the hospital received no compensation from him, but that he was treated in such private office as an individual patient of the physician, is not sufficient to maintain an action against the corporation for damages resulting from alleged malpractice, there being no evidence to show that the physician acted within the scope of his duties to the corporation. *Ibid.*

c Actions to Revoke License

1. Where an action is brought by the State Board of Charities and Public Welfare to vacate and annul a license it had issued for the maintenance and operation of a private hospital for the insane, on the ground of immorality and cruelty of its principal owner or manager, in which the manager is joined, a demurrer of the individual is properly sustained. *Board of Public Welfare v. Hospital,* 752.

2. Where there is allegation and evidence, in an action to annul and revoke the license of a private hospital for the insane, that immorality had been practiced among its employees by the manager and principal owner, and also cruel treatment had been used towards the patients by him, with separate issues as to each class of offense submitted to the jury, and the jury renders a partial verdict by leaving unanswered the issue as to gross immorality, the action of the court in directing a mistrial and refusing to sign judgment for defendant is not erroneous. *Ibid.*

HUSBAND AND WIFE.

A Abandonment.

a Elements of the Crime

1. Where there is sufficient evidence that the husband, indicted under C. S., 4447, had by his cruel conduct caused his wife to leave his home with the minor children of the marriage, a charge to the jury that leaves out wilfulness as an element of the offense is reversible error to the defendant's prejudice. *S. v. Yelverton,* 64.

HUSBAND AND WIFE—*Continued.*

d Judgments in Prosecution for Abandonment

1. It is within the discretion of the trial judge to provide for the support of the wife and the minor children of the marriage from the property or labor of the husband upon his conviction of wilfully abandoning them (C. S., 4447, 4449), and, *Held*, in this case an order that he pay a certain sum of money into the clerk's office monthly for this purpose, and secure compliance therewith by executing a bond in the sum of one thousand dollars come within the provisions of the statute. *S. v. Vickers*, 239.

2. Where the husband has been convicted of abandoning his wife and minor children, the order of the judge providing for their support should be definite in providing for the contingencies that may arise, such as the coming of age of the children, etc., and should state what part thereof is for the support of the wife and what part is for the support of the children; and an order requiring the defendant to pay a certain sum monthly into the office of the clerk of the Superior Court, under a bond of the defendant to secure compliance, without further provisions, will be remanded so that a more definite order be given in the judgment of the lower court. *Ibid.*

B Rights, Duties, and Liabilities (Divorce see Divorce—Right to kill in each others defense see Homicide E b 1—Specifically enforcing contract against see Specific Performance B a 1).

a Husband's Liability for Negligence of Wife in Driving Family Car (Note for family car signed by both will support action against wife see Bills and Notes A a 1)

1. Where the husband is the owner of an automobile which he permits to be used for family purposes, and while in such use by his wife she permits another to drive it, and remains with such driver on the front seat, and by the negligence of the one driving a child is struck and injured: *Held*, the negligence of the driver acting under the control and authority of the wife is the wife's negligence, and the husband is responsible in damages for the injury if proximately caused thereby, under the implied agency of the wife, under the "family-use" doctrine. *Goss v. Williams*, 213.

D Wife's Separate Estate.

b Rights and Liabilities of Husband

1. Under the change made in the law of married women's property rights by C. S., 2506, and Article X, sec. 6 of our Constitution, whereby a married woman is authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried, with certain restrictions as to her real estate, C. S., 2507, it is *Held*, where she receives checks from her parents as a personal gift to her which she endorses and delivers to her husband, there is a presumption that he receives the money in trust for her, and in the absence of evidence that it was a gift, she may recover the same in her action against him, or, after his death, against his personal representative. *Etheredge v. Cochran*, 681.

IMPROVEMENTS.

A Right of Tenant to Compensation Therefor.

a Effect of Partition on Right of Tenant in Common

1. The right of a tenant in common to compensation for improvements placed upon land is not necessarily foreclosed by a judgment for partition. *Lee v. Barefoot*, 107.

INDEPENDENT CONTRACTORS see Master and Servant D a.

INDICTMENT (For embezzlement see Embezzlement B, for larceny see Larceny B a).

E Issues, Proof and Variance.

a Method of Raising Question of Variance

1. The method of raising the question of variance between the indictment and proof is by motion to dismiss as in case of nonsuit, and not by motion in arrest of judgment. *S. v. Groce*, 280.

b Indictments Under Inapplicable Statutes

1. Where there is an erroneous conviction of wilful injury to personal property under C. S., 4331, when the indictment should have been drawn under chapter 61, Public Laws 1927, the prisoner should be discharged with permission to the solicitor to send another bill, if so advised. *S. v. Reed*, 357. (See, also, *S. v. Groce*, 280.)

INFANTS.

A Property and Conveyances.

a Power of Court to Order Sale of Infant's Property

1. In its equity jurisdiction the court in proper instances, and in proceedings properly instituted, has the power to order the sale of property belonging to a minor. *Shull v. Rigby*, 4.

c Right to Set Aside Conveyance

1. A minor who has sold his interests in lands at a certain price may not when coming of age receive the amount of the purchase price from the clerk of the court, with full knowledge of the facts, wait for four years and seek to disaffirm the transaction and have it set aside, his acts being a ratification of the sale. *Williams v. Williams*, 674.

INJUNCTION (Review of order granting injunctions see Appeal and Error J a—Injunctions against cemetery see Cemeteries B—Against Highway Commission see Highways A c—Against railroad in use of right of way see Railroads C b—Restraining further proceedings after sale under void judgment see Execution E a).

A Grounds for Injunctive Relief.

a Irreparable Injury

1. It is the province of equity to prevent by injunctive relief a continuance of unlawful conditions that work irreparable loss to the plaintiff in the suit. *Lineberger v. Cotton Mills*, 506.

INSPECTION OF WRITINGS see Bill of Discovery C.

INSURANCE (Surety bonds see Principal and Surety).

A Control and Regulation.

a Insurance Commissioner

1. Where a section of a revenue act allowing the Insurance Commissioner the use of a portion of the insurance license tax in the prevention of fires is omitted from a later act, and the collection of such tax is transferred to the Revenue Department, the effect is the withdrawal of this power from the Insurance Commissioner. *O'Neal v. Wake County,* 184.

E The Contract in General

b Construction and Operation

1. The material provisions of the standard form of a fire insurance policy written in accordance with C. S., 6436, 6437, are those of the law. *Greene v. Ins. Co.,* 335.

2. The common-law doctrine of presumptive death becomes a part of a contract of life insurance as if therein written. *Steele v. Ins. Co.,* 408.

c Reformation of Insurance Contract

1. The rule of law governing reformation of executed contracts applies to insurance policies, and where the evidence shows that the plaintiff accepted the policy of insurance as issued and that he was able to read and had full opportunity to read the policy, and the language of the policy is clear and unambiguous, he is not entitled to reformation of the policy for mistake and fraud. *Welch v. Ins. Co.,* 546.

I Avoidance of Policy for Misrepresentation or Fraud.

b Matters Relating to Person Insured

1. Under the provisions of C. S., 6460, as amended by chapter 13, Public Laws of 1927, and also with the amendment of chapter 82, Public Laws of 1925, a policy of life insurance where no medical examination of the applicant is required by the insurer under the statute, the policy to be void must be accompanied with fraudulent misrepresentations as to the health of the applicant, which must be shown by the company in resisting an action to recover upon the policy, and the fact that the insured was not in sound health at the time the policy was issued contrary to a provision in the policy is insufficient. *Holbrook v. Ins. Co.,* 333.

J Forfeiture of Policy for Breach of Promissory Warranty, Covenant, or Condition Subsequent.

a Violation of Stipulations and Covenants

1. Where the insured violates certain material stipulations and covenants contained in the policy of insurance, and there is a provision in the policy that such violation shall render it null and void, the insured is not entitled to recover thereon. *Welch v. Ins. Co.,* 546.

c For Failure to Give Notice of Disability

1. A waiver of the premium on a life insurance policy and the payment to the insured of a certain amount of money monthly in case of his permanent and total disability upon due notice and proof to be given the insurer before the time "the next premium on the

INSURANCE—*Continued.*

policy becomes due," will not work a forfeiture for failure to give the notice if the insured is under such disability as to incapacitate him from giving the notice specified, and the failure to give the notice is not attributable to any fault of his. *Rhyne v. Ins. Co.*, 717.

K Estoppel, Waiver, or Agreements Affecting Right to Avoid or Forfeit Policy.

a Agreements of Agent Affecting Right to Avoid or Forfeit Policy

1. Where a local agent of an insurance company has exceeded his authority, contrary to the expressed terms of the policy of insurance, by extending the time for the payment of premiums, and the policy provides for forfeiture upon nonpayment of premiums, the agreement made by the local agent is not binding on the company, and the forfeiture for nonpayment will not be relieved against unless it be shown that the company has bound itself to the extension by the method prescribed in the policy, by its conduct and course of dealings, or by ratification. *Foscue v. Ins. Co.*, 139.

2. The statutory form of a standard fire insurance policy requiring a permit to be issued for the house insured when unoccupied for more than ten days is a provision materially affecting the risk, and must be obtained in accordance with the requirements of the policy to make the insurer liable for damages by fire occurring after ten days vacancy, and after the policy has been issued and is in binding effect, the local agent of the insurer is without authority to bind his principal by acts and parol representations made contrary to the terms of the written instrument. C. S., 6436, 6437. *Greene v. Ins. Co.*, 335.

3. The acts and conduct of a local agent for the insurer, issuing a statutory standard policy of fire insurance, made contrary to the written provisions of the policy relating to a vacancy permit, which materially affects the character of the risk, will not be imputed to the insurer after the contract of insurance has been delivered and becomes a binding contract, and will not be regarded as a waiver by the company or its stipulation that rendered the policy void. *Ibid.*

M Proof of Death or Loss.

a Presumption of Death After Seven Years Absence

1. The common-law presumption of death of a person who has disappeared and not been heard from for seven years, under certain conditions, applies to a policy of insurance issued upon a person's life, and when he has validly assigned the policy for the payment of a debt, the person to whom it has been assigned may upon the necessary proof legally established, recover the amount of the policy from the insurance company, and an order requiring him to give a bond for the protection of the company paying the policy in the event the insured should still be alive, is erroneous. *Springer v. Shavender*, 116 N. C., 12, based upon the right of an administrator to sell lands to pay decedent's debts, cited and distinguished. *Steele v. Ins. Co.*, 408.

INSURANCE—*Continued.*

N Persons Entitled to Proceeds and Liability of Company.

a Upon Death of Beneficiary

1. Where a soldier insured under the provisions of the War Insurance Act names his brother and sister as beneficiaries in the policy, and is killed in action, leaving him surviving the brother and sister, and aunts and uncles, and shortly after the insured's death his brother is killed, leaving the sister his next of kin, and certain payments are made to the sister under the terms of the policy, and she dies, leaving her surviving a daughter: *Held*, upon the death of the insured his personal property descends immediately to the brother and sister as his next of kin, and, upon the death of the brother, the sister takes the whole interest as distributee and not as beneficiary, and upon her death the interest descends to her daughter as heir at law, to the exclusion of the aunts and uncles. *Trust Co. v. Brinkley*, 40.

b Under "Omnibus Clause" in Policy of Auto Dealer

1. An "Omnibus clause" in a policy indemnifying the owner and others driving his automobile with his consent against loss by damages is rendered inoperative as to such others by a provision expressly made a part of the policy, restricting the liability when such other person is not named in the policy as an insured. *Holton v. Indemnity Co.*, 348.

2. Where a prospective buyer of an automobile pays a judgment recovered against her for negligent injury caused by her while driving an automobile owned by a dealer who has a policy of insurance thereon to indemnify him against loss, in her suit against the insurance company to recover the amount of the judgment under the policy issued to the dealer, the question of whether she was agent or bailee of the dealer does not arise, the dealer having suffered no loss and being solely protected by the policy. *Ibid.*

c Under Loss Payable Clause

1. A person, firm, or corporation named in an ordinary loss payable clause in a policy of fire insurance is merely an appointee with only the right to receive the whole or part of the money to which the insured is entitled, and where the insured may not recover on the policy by reason of his having violated certain stipulations and covenants therein, the persons named in the ordinary loss payable clause are not entitled to recover, and when these facts are established the insurer's motion as of nonsuit should be allowed. *Welch v. Ins. Co.*, 546.

P Actions on Policies.

a Election of Remedies

1. Where the plaintiff sues on a policy of fire insurance he has made his election, and he may not thereafter seek reformation of the policy on the ground of mistake and fraud. *Welch v. Ins. Co.*, 546.

INSTRUCTIONS see Trial E.

INTERLOCUTORY ORDERS see Injunctions.

INTERSECTIONS see Highways B b.

INTERVENORS—Burden of proof on intervenors see Evidence C c.

INTOXICATING LIQUOR (As affecting capacity to commit crime see Criminal Law B a).

B Possession.

a Constructive Possession

1. The mere fact that a pint of intoxicating liquor was found in a basement of a building leased by the defendant, with evidence that the basement was not actually or constructively in the possession of the defendant, is not alone sufficient to raise the presumption of the unlawful possession by the defendant of such liquor, and an instruction to that effect is reversible error to the defendant's prejudice. *S. v. Foster*, 431.

ISSUES see Trial F a, Pleadings G.

JOINT TORT-FEASORS—Right to contribution see Torts B, release from liability see Torts C a—Joinder and liability see Parties B a.

JUDGES.

A Rights, Powers and Duties (Power to order sale of infants' property see Infants A a—Power to hear motion for new trial at subsequent term see New Trial C c—Power to affirm, modify, etc., report of referee see Reference C a—Power to allow amendment to complaint see Pleadings A c—Power to order sale of life estate for reinvestment see Life Estates C b).

a Power to Render Judgments on Motions, and Temporary and Permanent Restraining Orders Outside of District or Term

1. The resident judge of the district in which an action is pending is without jurisdiction to pass upon the question of continuing a temporary restraining order to final hearing, over objection, outside the districts, his authority being limited to interlocutory orders that do not substantially affect the merits of the controversy. *Turnage v. Dunn*, 105.

JUDGMENTS (In criminal cases see Criminal Law H—of foreign jurisdictions see Executors and Administrators A c—Pleading judgment as counterclaim see Pleadings C b 2—Execution on judgments see Execution—of justices of the peace see Justices of the Peace D c—Remand for proper judgment see Appeal and Error K b).

D Judgments by Default.

a By Default Final

1. A judgment by default final is irregularly entered upon a pleading that does not allege a sum certain or computable, due upon contract, express or implied. C. S., 595. *Byerly v. Acceptance Corp.*, 256.

G Entry, Record, and Docketing.

a Lien and Priority (Priority of judgment for Services rendered see Corporations G f).

1. A duly docketed judgment is a lien on the lands of the judgment debtor, C. S., 614, but is subject to the homestead interest in the lands as provided by Const., Art. X, sec. 2. *Farris v. Hendricks*, 439.

JUDGMENTS—*Continued.*

2. A judgment of the Superior Court is a lien upon the lands of the judgment debtor that he may own in the county at the time the judgment was docketed, but not upon lands which had been previously conveyed bona fide either by registered deed or mortgage upon which foreclosure has been made, or under execution sale of a prior docketed judgment of the Superior Court. C. S., 614. *Helsabeck v. Vass*, 603.

K Attack and Setting Aside (Sufficiency of allegations in action to set aside see Pleadings D a 3).

a Persons Who May Sue

1. A notice at a foreclosure sale of the property of a corporation under a mortgage that the employees of the corporation claim a priority under the provisions of C. S., 1140, does not affect the title conveyed to the purchaser at the sale, but the claimants after obtaining judgment against the corporation may maintain the superiority of their claims to those of the purchaser, but the purchaser is entitled to be heard, and may bring suit to restrain the execution. *Helsabeck v. Vass*, 603.

M Conclusiveness of Adjudication (Conclusiveness of order appointing receiver see Receivers B a).

a Matters Concluded

1. Where it has been formerly adjudicated by final judgment of a court of competent jurisdiction that an execution on a judgment against husband and wife severally will not issue against their land held by them by entirety, the matter is *res adjudicata*, and operates as an estoppel between the same parties in a subsequent action brought upon the same subject-matter, involving the same question. *Distributing Co. v. Carraway*, 58.

JUDICIAL SALES—see Execution, Partition A c, Executors and Administrators F.

JURY.

A Competency of Jurors, Challenges and Objections.

a Challenges to the Poll for Cause

1. Where a judgment is set aside for surprise and excusable neglect, and a new trial awarded in the Superior Court, and the same jury which gave a verdict in the first trial is empaneled, the party against whom the original verdict was rendered has a right to challenge each juror thereon as a principal challenge for cause as a matter of law, and upon the refusal of the trial court to allow such challenge a new trial will be awarded in the Supreme Court. Challenges for principal cause and challenges to the favor distinguished by Adams, J. *Butler v. Ins. Co.*, 203.

B Qualification of Jurors (New trial for disqualification or misconduct of or affecting jury see New Trial B a).

a Alienage

1. While alienage is not a statutory disqualification of a juror, C. S., 2312, it existed at common law, not changed by statute, and is recognized as a disqualification in the courts of this State. C. S., 970. *Hinton v. Hinton*, 341.

JURY—*Continued.*

2. Alienage disqualifies a person from serving as a juror until the process of naturalization has been completed. *Ibid.*

JUSTICES OF THE PEACE (Jurisdiction of, see Courts A a 1).

D Proceedings in Civil Cases.

c Rendition of Judgment

1. A justice of the peace who takes the case before him under advisement and later renders judgment must notify the parties thereof to afford them opportunity to appeal in accordance with the provisions of the statute. C. S., 661, 1530. *Blacker v. Bullard,* 696.

E Review of Proceedings.

b Recordari

1. Where a justice of the peace has taken a case under advisement and later renders judgment without notice to the defendant, the party against whom judgment is rendered, and the defendant does all that the law requires of him, after he had notice of the justice's judgment, to perfect his appeal to the Superior Court within the time required by statute, C. S., 661, 1530, and later has *recordari* issued from the latter court, the judgment appealed from will not be held as final. *Blacker v. Bullard,* 696.

LABOR AND MATERIALMEN—Surety's liability thereto see Principal and Surety B b.

LANDLORD AND TENANT (Right of tenant to compensation for improvements see Improvements A).

B Leases in General.

a Conflicting Leases of Same Property

1. Where the landlord leases his property to another and thereafter makes a contract with a real estate agency whereby it was authorized to obtain a lessee for the same property, and the real estate agency secures a lessee and makes a lease contract with him according to its authority, and both the real estate agency and the subsequent lessee, the plaintiffs, had knowledge of the prior lease, but were of the opinion it was void, and the prior lease was registered and is valid, and there is no evidence of a conspiracy to deprive the plaintiffs of their rights under the contracts: *Held,* the second lease was made subject to the first, and there was no breach of the contract with the real estate agency or its contract with the subsequent lessee, and neither of them is entitled to damages or to specific performance. *Craver v. Sorrell,* 561.

H Rent and Advancements.

a Liens Therefor

1. Where a mortgagor has surrendered his land to the mortgagee, but continues thereon as tenant of the mortgagee in making the crop, and a third person makes advancements, holding a lien therefor, and the lienor knows of the surrender at the time he made the advancements, his lien is secondary to that of the landlord's for rent, and a paper-writing of the agreement of surrender between the landlord and tenant was not necessary. *Montague v. Thorpe,* 163.

LARCENY (See, also, Burglary A a 1, 2).

B Prosecution and Punishment.

a Indictment

1. Where the bill of indictment for larceny and receiving charges ownership of the property as that of a person named therein and as to such owner there is no evidence, the defendant's motion to dismiss as in case of nonsuit should be allowed for failure of proof. *S. v. Pugh*, 725.

LAST CLEAR CHANCE see Railroads D c 2.

LAW OF THE CASE see Appeal and Error K c.

LAW OF THE LAND see Constitutional Law 2.

LEASES see Landlord and Tenant.

LICENSES see Taxation A c 1, B c.

LICENSEES see Railroads C c.

LIFE ESTATES.

C Sale of Estate for Reinvestment.

b Power of Court to Order Sale

1. The court has the power to order the private sale of lands affected with contingent interests under the provisions of C. S., 1744, under a proper finding that it would be to the best interests of all concerned, without submitting this issue to the jury, and where the proceedings are properly had and all parties are before the court, the objection is untenable that the sale was made under the decision of the court, and the parties had not agreed thereto. DeLaney *v. Clark*, 282.

d Proceeds of Sale and Reinvestment

1. Where the purchaser at a sale of lands for reinvestment pays his money into the court or to the person authorized by order of court to receive it, ordinarily he is not required to see to the proper application of the funds, its safety being taken care of by the court in its final decree. *DeLaney v. Clark*, 282.

LIMITATION OF ACTIONS (For wrongful death see Death B a—for action under Federal Employee's Liability Act see Master and Servant E d).

B Computation of Period of Limitation.

a Accrual of Right of Action

1. Where damages are sought for the flooding of the plaintiff's land, caused by the negligent construction and operation by a city of its sewage disposal plant, the verdict of the jury that the statute of limitations did not bar the right of action will be upheld where there is evidence that the tespass was not continuous, but was intermittent and variable, and that the first substantial damage occurred within three years next before the commencement of the action. *Ragan v. Thomasville*, 260.

LIMITATION OF ACTIONS—*Continued.*

C Acknowledgment, New Promise, and Part Payment.

a Effect in General

1. Under an agreement with decedent to pay for services to be irregularly rendered from time to time as needed without a definite time fixed for payment, but under a general promise to pay for them, in an action against the administrator of the deceased promissor for the value of such services: *Held*, a payment made by the deceased in 1925, intended by him to be made upon the debt, will have the effect of reviving the claim against the statute of limitations only for the three years next preceding his death in 1926, subject to the credit of the payment so made. *Phillips v. Penland*, 425.

LOGS AND LOGGING see Deeds and Conveyances F.

LOGGING ROADS see Master and Servant C b 6.

LOST OR DESTROYED INSTRUMENTS.

A Proceedings to Recover on Lost Instruments.

a Evidence and Proof of Instrument

1. A recovery may be had upon a lost or destroyed note upon satisfactory evidence of its execution, and where this is proved, testimony as to the note itself is admissible. *Wooten v. Bell*, 654.

2. The provisions of C. S., 3055, that upon payment of a note it must be delivered up to the party paying it, does not apply where the note has been lost or destroyed, and, under the facts of this case, there was no error in not requiring a bond for the protection of the maker where there was no request made therefor. *Ibid.*

MALICIOUS PROSECUTION.

A Termination of Prosecution.

1. Where in the plaintiff's action to recover upon a check given by the defendant, and protested at the bank upon which it was drawn, the defendant sets up a counterclaim upon the ground that the plaintiff wrongfully and maliciously had him arrested, etc., it is necessary for the defendant to show the termination of the proceeding in his favor, as well as malice and want of probable cause. *Wingate v. Causey*, 71.

MANSLAUGHTER see Homicide.

MARRIAGE.

B Validity.

a Marriage of Female Between Fourteen and Sixteen

1. The marriage of a female between the ages of fourteen and sixteen without the written consent of her parent and without the special license required by chapter 75, Public Laws 1923, amending C. S., 2494, is not void but voidable. *Sawyer v. Slack*, 697.

2. C. S., 2494, as amended by chapter 75, Public Laws 1923, does not expressly declare a marriage void when the license is issued upon fraudulent representations for the marriage of a female between the ages of fourteen and sixteen without the written consent of her parent, and the courts will not so construe it by implication. *Ibid.*

MARRIAGE—*Continued.*

C Annulment.

a Jurisdiction of Suit for Annulment

1. The courts of this State have jurisdiction of a suit to annul a marriage performed here, although the plaintiff was a nonresident of this State at the time of the commencement of the suit. C. S., 1658. *Sawyer v. Slack*, 697.

2. A suit to annul a marriage for statutory reasons is in the nature of an action for divorce, with the same procedure except that the affidavit setting forth the jurisdictional facts is not required. *Ibid.*

b Parties Who May Bring Suit for Annulment of Voidable Marriage

1. Where the register of deeds has been induced by fraudulent representations to issue a license for the marriage of a female between the ages of fourteen and sixteen without conforming with chapter 75, Public Laws 1923, as to the written consent of her parent, the marriage is voidable only at the suit of the female, and neither the parent nor the register of deeds may maintain a suit to declare the marriage void, though the latter may at most maintain an action to revoke and cancel the license issued by him before the solemnization of the marriage. *Sawyer v. Slack*, 697.

MASTER AND SERVANT.

A The Relation (Priority of employee of corporation for labor rendered see Corporations G f).

d Preventing Discharged Employee From Being Employed by Others

1. Where an employer has discharged his employee for being a member of a lawful association of like employees, and has advised others, without a request from them, who would have engaged the services of such employee that he would not sell his product to them should they employ him, and thus has prevented the discharged employee from getting employment within the State, and forced him to obtain employment in another state, depriving him of his living at home here with his family, etc.: *Held*, the employee is entitled to recover damages in his civil action against his former employer, and a demurrer *ore tenus* to a complaint setting forth this cause of action is bad. C. S., 4477, 4478. *Goins v. Sargent*, 478.

2. The provisions of C. S., 4477, 4478, allowing a discharged employee to recover damages in a civil action against his former employer for a conspiracy to deprive him of getting employment from others is remedial and does not put the burden upon the plaintiff of showing either malice or actual damages. *Ibid.*

C Master's Liability for Injuries to Servant (Measure of damages see Damages F).

a Nature and Extent in General

1. Where a personal injury is inflicted on the employee by the negligent failure of his employer to furnish him a safe place to work, it is not required, for recovery of damages, that the particular injury should have been foreseen, if it could have been reasonably anticipated that injury or harm might have followed the wrongful act. *Smith v. Ritch*, 72; *Street v. Coal Co.*, 178; *Ellis v. Herald Co.*, 262; *O'Brien v. Parks Cramer Co.*, 359.

MASTER AND SERVANT—*Continued.*

2. In order for the servant to recover damages against the master for the master's negligence in failing to provide safe tools and appliances, the master's negligence must be the proximate cause of the injury, and the question of proximate cause is ordinarily for the jury to determine. *Lowe v. Taylor*, 275.

3. Evidence that the plaintiff, while engaged in his employment of unloading heavy railroad rails from a car, had his eye permanently injured by some particle flying therein immediately after the passage of one of the defendant's trains, and evidence that there was trash upon the ground at the place and that the rails had pieces of rust on them that would come off, is insufficient evidence of a causal connection between the negligence of the defendant in failing to furnish a suitable place in which to work, or of a result that could have been reasonably anticipated, and a motion as of nonsuit thereon should have been granted. *Owens v. R. R.*, 307.

4. The master is not an insurer of the safety of the servant. *O'Brien v. Parks Cramer Co.*, 359.

b Tools, Machinery, and Appliances and Safe Place to Work

1. Evidence that the plaintiff's intestate, while working on a platform 26 inches wide, fell into a river and was drowned, by reason of his saw "pinching," and throwing him off his balance, is not sufficient to establish negligence on the part of the master in not furnishing him a safe place to work, and defendant's motion for judgment as of nonsuit was properly allowed. *Parks v. Sanford & Brooks*, 36.

2. Whether or not the place at which plaintiff's intestate was at work was unsafe is a question for the jury, and the opinion of witnesses on this question is properly excluded. *Ibid.*

3. The master is required, within the exercise of ordinary care, to furnish his employee a reasonably safe place to do the work required of him under the terms of his employment, and for such failure, when the proximate cause of an injury, the master is held liable in damages. *Smith v. Ritch*, 72; *Ellis v. Herald Co.*, 262.

4. While the master is not ordinarily responsible in damages resulting from the use of simple tools in the ordinary way, it is otherwise when he fails to furnish him with a safe place to work, and he is ordered by the employer's vice-principal to continue to work under unsafe conditions, which proximately causes the injury in the action. *Smith v. Ritch*, 72.

5. Where the *alter ego* of the employer would not permit the employee, a carpenter, to build a scaffold upon which to stand while nailing planks on a building above his head, and to do his nailing by reaching out of a window in the building, preventing the use of his two hands, and the evidence tends to show that the safer way was by building the scaffold; and by leaning out of the window the employee's eye was brought in close proximity to the nail being driven, and the nail, owing to this cramped position, was likely to glance: *Held*, evidence sufficient to take the case to the jury upon the issue of defendant's actionable negligence, and to deny defendant's motion as of nonsuit. *Ibid.*

MASTER AND SERVANT—*Continued.*

6. Where the employee of an independent contractor is injured while engaged in loading logs upon the cars of a lumber road, the fact that the cars furnished by the lumber company were not furnished with automatic couplers is not evidence of any negligence; companies of such character being required to furnish cars with such ordinary couplings as are approved and in general use for the work being done. *Moore v. Rawls*, 125.

7. Where the plaintiff's intestate was engaged to deliver gasoline to defendant's customers by auto truck, and there was evidence tending to show that he was killed by the truck turning over on the highway because of defective brakes thereon, defendant's motion as of nonsuit thereon will be denied, the question of the causal connection between the negligence and the injury being ordinarily for the jury. *Lowe v. Taylor*, 275.

8. Where in an action to recover damages of an employer for its negligence in failing to provide an employee a safe place to work, the evidence tended only to show that the plaintiff was required to go up flights of steps at night in the performance of his duties as watchman in the defendant's cotton mill, and was injured by tripping over a piece of wire stretched across a step between two nails with evidence tending to show that the wire was not used in any way in connection with the operation of the mill, and that it was not there at six o'clock of the evening before, with conflicting evidence as to the sufficiency of an electric light burning near by, but that the plaintiff had gone up and down these steps many times with the same amount of light without injury, and without complaining during his several months employment at the mill: *Held*, the evidence was insufficient to take the issue of the defendant's actionable negligence to the jury. *Craver v. Cotton Mills*, 330.

9. Where an employee and his helper are required in the course of their employment to rivet sheet metal to the ceiling of a room by the use of an electrically driven drill which was defective in having a short-circuit, and this proximately caused a shock to the helper, who was standing on a ladder with the drill, causing him to fall upon the employee below, the plaintiff in this action, resulting in the damages in suit, the evidence is sufficient to take the case to the jury and uphold a verdict in the plaintiff's favor. *O'Brien v. Parks Cramer Co.*, 359.

10. Evidence tending to show that a servant was injured in the course of his employment by a defective driller furnished for the purpose by the employer, and that the employer had been given notice of the defect and the danger of continuing to use the defective tool, it is prima facie sufficient to take the issue of actionable negligence to the jury, and a recovery of damages may be had when shown to have been proximately caused by the defect. *Ibid.*

11. Where there is evidence tending to show that the master furnished his servant a defective driller machine with which to do the work within the scope of his employment, and was informed of the defect, or by proper inspection should have known of the defect in time to have repaired the tool and avoided the injury, it is for the jury to determine whether he was negligent in failing to inspect. *Ibid.*

MASTER AND SERVANT—*Continued.*

12. It is the nondelegable duty of the master to furnish the servant a safe place to work and safe tools and appliances, and to keep them safe by reasonable inspection, under the rule of the ordinarily prudent man under the circumstances. *Ibid.*

13. Where an electrically driven machine furnished by the master to the servant had previously shocked other employees, it is evidence of a defect therein and evidence that the master knew, or by the exercise of reasonable inspection should have known of the defect, and is sufficient to take the issue of the master's negligence to the jury, the doctrine of *res ipsa loquitur* applying. *Ibid.*

14. The master is only required to exercise ordinary and reasonable care in furnishing his servant reasonably safe and suitable tools and appliances with which to perform his duties, as may be evidenced by like tools and appliances that are known, approved, and in general use, and in an action to recover damages caused by an electrically driven sausage machine, the admission of evidence of a machine used for the purpose with less danger is reversible error in the absence of evidence that it was in existence at the time, or that it was then known, approved, and in general use. *Grubbs v. Lewis*, 391.

15. *Held*, evidence in this case sufficient to be submitted to the jury upon the question of defendant's negligence in not furnishing his employee a reasonably safe place in which to work. *Tate v. Parker*, 499.

16. Upon evidence tending to show that the *alter ego* of the defendant mining company instructed the plaintiff, an inexperienced man, to proceed to dig for talc at a certain place in its tunnel, without warning or instructing him of the danger, and the *alter ego*, after a cursory examination, pronounced the place safe, and within a few moments thereafter the plaintiff was injured by the caving in of the mine from an overhanging ledge: *Held*, defendant's demurrer to the sufficiency of the evidence upon the issue as to defendant's negligently failing to furnish the plaintiff a safe place to work, in the exercise of due care, is properly overruled. C. S., 567. *Mace v. Mineral Co.*, 169 N. C., 143, cited and distinguished. *Christopher v. Mining Co.*, 531.

17. The admission of photographs of the machine upon which it is alleged the plaintiff's intestate was killed, should be confined for the purpose of allowing witnesses to explain their testimony in respect thereto, and the admission of such photographs as substantive evidence of the master's failure to supply his servant safe tools and appliances is reversible error. *Honeycutt v. Brick Co.*, 556.

c Methods of Work, Rules, and Orders

1. Where the question involved in a personal injury action against an employer, involving the question as to the common method of doing the work at which the employee was at work at the time: *Held*, evidence as to the usual methods of work was not prejudicial or reversible error under the facts of this case. *Smith v. Ritch*, 72.

2. In an action to recover damages for the negligent killing of plaintiff's intestate in the repairing of an "air course" in a coal mine, where there is evidence that the deceased met his death by a rock falling

MASTER AND SERVANT—*Continued.*

upon him from the top of the course, while working under the direction of the defendant's superintendent in an unprotected place, evidence is competent that it was the general and approved custom in such instances to "fore-pole" the work, and had this been done it would have afforded protection to the intestate and the injury would not have occurred. *Street v. Coal Co.*, 178.

3. Where, under the order of the defendant's vice-principal, its employee went upon the top of the defendant's press to repair an electrically driven machine, and there in a small space near the ceiling, it was probable that he would come in contact with a deadly, uninsulated electric rail, rendered harmless by the order of the vice-principal that the current be turned off, and while working there the vice-principal suddenly ordered the current to be turned on again, and there was circumstantial evidence that the intestate could not have heard such order, and there was evidence that there was a safer method of doing the work: *Held*, defendant's motion as of nonsuit upon the evidence was erroneously granted in the lower court. *Ellis v. Herald Co.*, 262.

4. Where there is evidence that a totally inexperienced employee is instructed by the superintendent of a manufacturing company to assist another, an experienced employee, in putting a blow pipe in a boiler for the purpose of its repair, and upon the assurance of safety and under immediate direction of the other employee he taps with a hammer a certain pipe, and suddenly steam envelops him, causing the injury in suit: *Held*, sufficient to take the case to the jury upon the issue of the defendant's actionable negligence. *Overton v. Mfg. Co.*, 670.

d Warning and Instructing Servant

1. Where the plaintiff's intestate was employed to work in the erection of a concrete pier of a bridge across a stream, and an action is brought to recover damages for his alleged wrongful death, evidence tending to show that the intestate had been working on the erection of this pier several days before it was high enough to be dangerous from the passing over it of heavy buckets of concrete, and that he was ordered to work on top of the pier without being warned of the danger under the changed circumstances from the passing of these buckets of concrete over the higher pier, and he was struck and killed by one of these buckets, is sufficient upon the actionable negligence of the defendant upon the appropriate issue and defendant's motion as of nonsuit is properly denied. *Young v. Wood*, 435.

f Assumption of Risk

1. Under the facts of this case, where damages are being sought for an alleged negligent injury caused by the use of ordinary tools in an unusual way, with evidence that the negligent failure of the employer to furnish his employee a reasonably safe place to work and the negligent order of the employer's *alter ego* to do the work, involving the issues of negligence, contributory negligence, and assumption of risk: *Held*, the submission of the question of assumption of risk in the charge of the court upon the issue of contributory negligence, without submitting the issue of assumption of risk separately is not prejudicial or reversible error. *Smith v. Ritch*, 72.

MASTER AND SERVANT—*Continued.*

2. The doctrine of assumption of risk will not ordinarily preclude a recovery by an employee for an injury caused by the employer's negligence unless the danger is so open, obvious and imminent that no man of ordinary prudence would continue in the employment and incur the risk thereof. *Maulden v. Chair Co.*, 122; *Street v. Coal Co.*, 178.

3. Where there is any doubt as to the facts or the inferences to be drawn therefrom, the question of whether the risk incurred in the employment is so openly, obviously and imminently dangerous as to put into operation the doctrine of assumption of risk, is for the jury, and it is only where there is a clear case that it is one of law for the court. *Maulden v. Chair Co.*, 122.

4. The burden of proof as to the assumption of risk is upon the defendant. *Maulden v. Chair Co.*, 122; *Young v. Wood*, 435.

5. Where the servant is killed while acting under the instruction of the master he is not held to assume the risks of existent dangers of which he is not aware. *Young v. Wood*, 435.

g Contributory Negligence of Servant

1. The defendant in an action to recover damages for a wrongful death has the burden of proving his defense of contributory negligence and assumption of risks. *Young v. Wood*, 435.

2. While in the course of his employment the plaintiff was engaged in running a truck loaded with several tons of lumber, running on wheels upon a track from his employer's dry kiln to a transfer point, and knowing that the truck would run down on an incline, chose of his own volition, without instructions to do so, to try to stop the moving truck by getting in front of it and bracing his back against it, in an unusual manner, and thus received the injury in suit: *Held*, the conduct of the plaintiff constituted contributory negligence that would bar his recovery, if his negligence was the cause or one of the causes without which the injury would not have occurred. *Lunsford v. Mfg. Co.*, 510.

D Master's Liability for Injuries to Third Persons (Liability of hospital see Hospitals).

a Work of Independent Contractors

1. Where the principal contractor for the loading of logs on cars of a lumber company furnishes a skidder for this use to an independent contractor who has full charge of the employees for the work, and they are solely employed by him under the terms of the independent contractor, and in fact while the principal contractor may be held liable to one of these employees for furnishing a defective skidder which causes an injury, it is not responsible for such injury when the injury is solely caused by the negligence of the independent contractor in operating the skidder, and there is no evidence or claim that the skidder in use was defective. *Moore v. Rawls*, 125.

b Scope of Employment

1. Where a servant by his own independent act injures another servant of employer working under him, whether wilfully or otherwise, entirely beyond the scope of his employment, and there is nothing

MASTER AND SERVANT—*Continued.*

to show that the master had actual or implied knowledge of any viciousness or recklessness of the employee committing the act, the master is not liable in damages as a matter of law for the injury thus inflicted. *Ferguson v. Spinning Co.*, 614.

2. The liability of the master in damages for the negligent acts of the servant extends only to such acts that occur within the scope of the servant's duties or in furtherance thereof, and where the evidence tends only to show that the injury in suit was caused by the servant in going in his automobile to his master's store on a holiday to light the lights therein, without further duty to perform on that occasion, a motion for judgment as of nonsuit thereon is properly granted, and the servant's intention of performing an insignificant, gratuitous service when he reached the store, not requested or required of him by the master, does not vary this result. *Wilkie v. Stancil*, 794.

E Federal Employers' Liability Act.

d Limitations of Actions Thereunder

1. The Federal Employers' Liability Act does not allow an action for damages for a wrongful death to be brought after two years from the date of the death complained of, and where suit has been commenced and nonsuit entered, it does not have the effect of extending the time in which the same action may be brought under the Federal Statute. *Murray v. R. R.*, 695.

MINORS see Infants.

MORTGAGES.

C Construction and Operation.

b Parties and Debts Secured

1. Where contemporaneously with a deed to lands a purchase-money mortgage or deed of trust is given to the grantor the title passes *eo instanti* to the mortgagee or trustee for the security of the note to which the deed is secondary, and this right attaches in favor of a third person who under agreement of the parties advances the money for the payment of the purchase price to the amount of the money so advanced by him. *Trust Co. v. Brock*, 24.

c Lien and Priority; Registration (Priority of judgment for services rendered corporation to mortgagee see Corporations G f).

1. A purchase-money mortgage given simultaneously with a deed to lands is regarded as but a single transaction and vests the equity of redemption in the grantee of the deed subject to the security title of the grantor, and does not require registration except as to purchasers for value and creditors of the grantor in the deed. *Trust Co. v. Brock*, 24.

2. The proper indexing of a mortgage upon lands is an essential part of its registration, and where the husband and wife make a mortgage on her lands which is only indexed by the register of deeds in the name of the husband, it is not good as against a subsequent purchaser for value by deed from the husband and wife that had been properly indexed and registered. C. S., 3561. *Heaton v. Heaton*, 475.

MORTGAGES—*Continued.*

3. Where preferred stockholders of a corporation are given a priority over creditors by an agreement in its charter and certificates of stock giving the holders thereof a lien on its realty, even if the agreement be construed as a mortgage, it is inoperative as to creditors without compliance with our statute requiring registration. C. S., 3311. *Ellington v. Supply Co.*, 784.

F Transfer of Mortgaged Property.

a Liability of Mortgagor for Debt After Transfer

1. By selling the mortgaged premises the mortgagor of lands is not relieved of his personal liability upon the note secured by the mortgage, outstanding in the hands of a holder in due course. *Keller v. Parrish*, 733.

b Liability of Purchaser of Equity of Redemption for Debt Assumed in Mortgage

1. Where the grantees in a deed to lands expressly assume an existing mortgage debt thereon they become liable not only to the mortgagor, but directly to the holder of the note secured by the mortgage who has acquired it for a valuable consideration in due course. *Keller v. Parrish*, 733.

2. The grantees of land subject to a mortgage are estopped to deny the validity of the mortgage. *Ibid.*

G Satisfaction and Cancellation.

a Form and Validity of Cancellation

1. The statute in regard to the cancellation of mortgages and deeds of trust by cancellation entry upon the record must be strictly complied with in order to secure the grantee in a subsequent conveyance of the *locus in quo* against the prior encumbrance, and where this is done upon exhibit of the canceled conveyance and notes marked paid, the entry should recite correctly the name of the beneficiary and payment of the note, notes or bonds, as the case may be, by the payee thereof. C. S., 2594. *Mills v. Kemp*, 309.

b Void Cancellation; Notice to and Rights of Subsequent Mortgagees and Creditors

2. Where an entry of cancellation is made of record by the register of deeds in canceling a mortgage, C. S., 2594, reciting another name as mortgagee, trustee or *cestui que trust* than that appearing in the registration of the instrument, and that the "bond" was marked paid, when the instrument recited four bonds maturing in series, it is sufficient to set a later grantee or mortgagee upon inquiry as to whether the register of deeds had made a mistake in canceling the mortgage, and fix him with notice of all facts a reasonable inquiry would have revealed. *Mills v. Kemp*, 309.

H Foreclosure by Action (Setting aside foreclosure by heirs for irregularity see Descent and Distribution C a 1).

j Right of Mortgagee to Bid in Property

1. The holder of a note secured by a mortgage on lands may bid at a judicial sale of foreclosure under a decree of court authorizing the sale, and acquires title in the absence of fraud. *Bank v. Peanut Co.*, 733.

MORTGAGES—*Continued.*

k Deficiency and Personal Liability

1. Where the defense to an action to recover the balance alleged to be due on a note after foreclosure of the mortgage securing it, is that the payee agreed to bid the lands in for the full amount of the note, and the evidence discloses an offer to do so without acceptance of such offer, the plaintiff is entitled to recover, and the burden of proving the defense is on the defendant. *Dunlop v. Smith*, 502.

2. Where the purchaser of the equity of redemption in his deed expressly assumes the payment of the note secured by the mortgage, the holder of the note may enforce the payment against the purchaser of the equity of redemption personally to the extent of the deficiency after applying the proceeds of the sale upon the note, under the principle that one for whose benefit a contract is made may recover thereon. *Keller v. Parrish*, 733.

3. Where the purchaser of an equity of redemption assumes the payment of a prior mortgage note, an agreement between him and the mortgagor, releasing him from liability upon the reconveyance of the equity of redemption to the mortgagor, is not binding upon the holder of the mortgage note where he has not consented thereto, and his right to recover being directly upon the promise made for his benefit, the mortgagor is not a necessary party in his action to recover for the deficiency after the sale. *Ibid.*

l Disposition of Proceeds and Surplus (Right to homestead therein see Homestead A d 1)

1. The only authority conferred by C. S., 2591, on the clerk of the Superior Court is to order a resale of property foreclosed under mortgage or deed of trust upon lands where the bid has been raised in ten days under certain terms and conditions therein prescribed. and where there are a first and second mortgage upon such lands, foreclosed under the second, an exception to the distribution of the proceeds is untenable, the remedy, if any, being by independent action. *In re Bauguess*, 278.

2. The mortgagor of lands before foreclosure may sell and convey by deed his right of equity of redemption to another upon agreement that the purchaser assume the payment of the mortgage lien, and thereafter when the lands are foreclosed the purchaser is entitled to the surplus remaining as against his vendor. *McKinney v. Sutphin*, 318.

3. Where the mortgagor has conveyed his equity of redemption, upon a later foreclosure, the surplus does not belong to the mortgagor, but to the grantee in the deed conveying his equity of redemption, the surplus representing the value of the equity conveyed, and where the purchaser of the equity alleges these facts, the mortgagor's demurrer to his plea is bad. *Ibid.*

MORTUARY TABLES see Death B c.

MOTIONS—In arrest of judgment see Criminal Law J—for New Trial see New Trial C—for new parties in Supreme Court see Appeal and Error A b—Hearing motion to set aside verdict out of term see Trial G a 1.

MUNICIPAL CORPORATIONS (Counties see Counties—Acquisition of prescriptive rights by municipality see Adverse Possession D).

A Creation, Alteration, Existence, and Dissolution.

b Territorial Extent and Annexation

1. Where by special act the Legislature grants a charter to an existing city, enlarging the city limits to take in territory within one or more nonlocal tax districts, it is not necessary, nor contrary to the Constitution, Art. VII, sec. 7, that a vote of the people within the added territory be had either upon the question of annexing such territory or upon the question of levying school taxes therein, the object of the charter being to provide for the government, welfare and improvement of the city, and not primarily for the mere maintenance of schools. *Hailey v. Winston-Salem*, 17.

2. Where the Legislature grants a charter to an existing city enlarging the city limits to take in territory within a school district, the municipality takes control of all matters over which it is given authority, to the exclusion of other governmental agencies, but this result is not in conflict with Art. II, sec. 29, of the Constitution, prohibiting the Legislature from passing any local, private or special act establishing or changing the lines of school districts; any change in existing school districts which may result being merely incidental to the main purpose of investing the inhabitants of the city with control of all municipal matters. *Ibid.*

B Governmental Powers and Functions.

a Power of City to Maintain Schools (Power to tax therefor see Taxation A b)

1. The power given by C. S., 2832 (Art. 16), to "any city" to acquire, establish and operate schools applies to any city whether or not it has adopted a plan of government under C. S., ch. 56. *Hailey v. Winston-Salem*, 17.

2. Where a city is required by statute to establish, maintain, support, etc., its public schools: *Held*, necessary buildings are an integral factor in the maintenance of the school system, and their construction is a municipal purpose. *Ibid.*

D Officers, Agents, and Employees (Bonds of, see Principal and Surety B c).

d Personal Civil Liability for Official Acts

1. Public road officials of a township may not be held personally liable for their official acts in the absence of allegations that the acts were done maliciously or corruptly. *Lassiter v. Adams*, 711.

e Criminal Liability for Misfeasance, Nonfeasance or Malfeasance (of Superintendent of State Hospital see Public Officers)

1. A member of the board of education of a county is not guilty under the provisions of C. S., 4390, for voting as such member for the purchase of school buses from a company selling them owned by his wife, and in which he had no pecuniary interest and for which he worked upon a salary, when the sale was made by other agents of the company upon a commission basis. *S. v. Debnam*, 740.

MUNICIPAL CORPORATIONS—*Continued.*

E Torts.

c Defects or Obstructions in Streets or Other Public Places

1. A motion as of nonsuit upon evidence in a personal injury suit against an incorporated town where there is evidence tending to show that the plaintiff was aware of an obstruction alleged to have caused the injury, but did not think of it at the time thereof, the light to the place having been obstructed by the town is properly denied under the facts of this case. *Boswell v. Tabor*, 196.

d Defects or Obstructions in Sewers, Drains, and Water Courses (Joinder of municipality as joint *tort-feasor* for damages caused thereby see Parties B a 1—Limitation of action therefor see Limitation of Actions B a 1)

1. A valid charter provision of a city that no action for damages shall be instituted against it unless within six months after the damage notice shall be gvien in writing to the municipal authorities of the date and place and the amount of damages claimed, is substantially complied with if a notice is filed which puts the municipality upon notice of the character, place, and time of the injury, and the amount of damages claimed, and is sufficient to apprise it of the nature and character of the damages sought in the action. *Peacock v. Greensboro*, 412.

2. Where there is a valid provision in the charter of a municipality requiring written notice of a claim of damages for an injury within six months from the time of the occurrence of the injury, the required notice given within six months from the time of the first appreciable or substantial injury is a compliance with the provisions as to the time of notice. *Ibid.*

F Contracts and Franchises.

b Assignment or Surrender

1. Where under an ordinance in the nature of a contract a water corporation receives from a city a franchise upon condition that it furnish water free to the city for certain public purposes including the public schools not owned by the city, but under the control of trustees of its graded schools and the board of education of the county, and by agreement between the city and the water company the former takes over the property of the latter, and conducts the business: *Held*, in effect the transaction is a surrender of the franchise by the water company, and not an assignment, and the schools cannot claim the right from the city for a free water supply. *Board of Trustees v. Henderson*, 687.

2. Where a city by ordinance contract imposes on a water company the requirement of furnishing water free to the graded schools operated therein, and the city thereafter acquires the plant by a surrender of the franchise: *Held*, under the facts of this case, fair dealing requires the city to give the school authorities reasonable notice of its intention to charge the schools for water furnished them, and the city may collect only for water furnished after such notice. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

G Public Improvements (Surety bonds therefor see Principal and Surety B b).

c Assessments Therefor

1. Where in accordance with the provisions of C. S., 2710(1), the board of aldermen grant a petition for street improvements requesting the assessment of a larger proportion of the cost of the improvements against the lots of land abutting directly thereon than is otherwise required by statute, after the confirmation of the assessment roll a subsequent board of aldermen is without power to grant a petition of the abutting landowners for a reduction of the assessment upon the ground alone that the amount of the assessments exceeded that they had originally anticipated, and a suit by other taxpayers of the town to enjoin the granting of such petition is proper. C. S., 2715, 3 C. S., 2806(f), have no application. *McClester v. China Grove*, 301.

2. Where a municipality by sufficient adverse use has acquired title to a street within the original grant of right of way to a railroad company, the property along the boundary of such street belonging to the railroad company is liable to assessment for paving and street improvements as provided by statute. *In the Matter of Assessment Against R. R.*, 756.

g Parks and Recreation Grounds

1. Where the commissioners of a city have purchased lands tacitly or expressly for the purpose of a public park, and have sold the same and turned the proceeds over to a city park and recreation commission created by statute, an action brought to require the defendants to place in the city treasury the sum so paid is an affirmance of the city's right to have purchased and to have sold the lands; and, *Held further*, that the transaction having been completed, the question has become academic. *Hall v. Redd*, 622.

2. Where a city sells land used for recreation purposes and turns the proceeds of the sale over to its park and recreation commission the action is not a pledging of its faith and credit so as to involve the imposition of a tax, and our constitutional provision requiring a vote of the people for the levy of a tax except for necessary expenses is inapplicable, Art. VII, sec. 7, and this result is not affected by the fact that the statutory park commission was limited in its annual expenditures to an amount to be derived from a certain *ad valorem* tax. *Ibid.*

NEGLIGENCE (Of master see Master and Servant C, D—of railroads see Railroads D—of physicians see Physicians and Surgeons C b—of telegraph companies see Telegraph Companies A—of power companies see Electricity A—of manufacturer in bottling drink see Food A a—of municipal corporations in obstructing streets, etc., see Municipal Corporations E c—in use of Highways see Highways B—Liability for concurrent negligence see Parties B a).

A Acts or Omissions Constituting Negligence.

a In General

1. No presumption of negligence is raised by the fact alone that an accident has occurred, and it is required that the plaintiff in his

NEGLIGENCE—*Continued.*

action for actionable negligence show by his evidence that the defendant breached some duty owed to the plaintiff's intestate and that such breach was the proximate cause of the injury, and upon failure of the plaintiff to introduce evidence tending to show all of the elements of injury, negligence and proximate cause, a motion as of nonsuit is properly allowed. *Miller v. Holland*, 739.

B Proximate Cause.

b Actionable Negligence Must Be Proximate Cause of Injury (In action against master see Master and Servant C a 2, 3; C b 7)

1. Negligence to be actionable must be the proximate cause of the injury in suit, or that cause which, in natural and continuous sequence, unbroken by any new or independent cause, produces the event, and without which it would not have occurred. *Gibbs v. Telegraph Co.*, 516.

c Intervening Causes

1. Upon evidence tending to show that independent acts or misconduct of another intervened and proximately caused the injury in suit, which the defendant in the exercise of ordinary care could not have reasonably anticipated, and defendant's motion as of nonsuit should be granted. *Craver v. Cotton Mills*, 330.

C Contributory Negligence (Of passenger see Bus Lines B c—of servant see Master and Servant C g—of person on track see Railroads D b 3; D c 4).

a Of Persons Injured in General

1. The contributory negligence of the plaintiff will bar his recovering damages arising from the negligence of the defendant when the plaintiff's negligence concurs and coöperates therewith and becomes the real, efficient and proximate cause of the injury in suit, or that cause without which the injury would not have occurred. *Bailey v. R. R.*, 515.

c Imputed Negligence see Railroads D b 5.

NEW TRIAL.

B Grounds.

a Disqualification or Misconduct of, or Affecting Jury

1. Where a defendant in a personal-injury suit carries indemnity insurance, in passing upon the jury it is not error for the trial judge to permit the defendant's attorney to ask for his information only, whether the juror challenged was an agent or representative of the indemnity company, the question being restricted to this purpose openly by the court, and the refusal of the trial court to grant a new trial upon this ground is not reversible error. *Goss v. Williams*, 213.
2. Where under examination for cause a juror has misstated the fact that he was an alien, and it is made to appear that the party examining him was misled thereby and would not have accepted him had the truth been known to him, on appeal the action of the trial judge in setting aside an adverse verdict as a matter of law will be sustained. *Hinton v. Hinton*, 341.

NEW TRIAL—*Continued.*

C Motion for New Trial and Hearing.

c Hearing at Subsequent Term Upon Agreement

1. Where a party to the action has duly moved to set aside the verdict of the jury for the disqualification of a juror serving thereon, the adverse party may not successfully object that the motion was acted upon at a subsequent term of the court when he had consented to the continuance of the motion. *Hinton v. Hinton*, 341.

NONSUIT see Trial D a.

NORTH CAROLINA PARK COMMISSION see Eminent Domain A a: B a; C a; Constitutional Law I a 1, 2; I b 1; Statutes A a 1; Taxation A e 1.

NOTARIAL SEALS see Deeds and Conveyances A f.

NOTES see Bills and Notes.

NUISANCES see Cemeteries B.

OFFICERS see Public Officers.

PARENT AND CHILD.

A Rights and Liabilities of Parent (Abandonment of child see Husband and Wife A d 1, 2).

a For Negligent Driving of Family Car by Child

1. Where the father directs his nineteen-year-old son to take his automobile to the place in which it was kept, and to leave it there, he is not liable in damages for the negligent driving of his son in afterwards taking the car out without his knowledge for his own purposes, the doctrine of the family car not applying to the facts of this case. *Ewing v. Kates*, 354.

PARKS—Municipal Parks see Municipal Corporations G g.

PARK COMMISSION see Eminent Domain A a 1, 2; B a; C a 1; Constitutional Law I a 1, 2; I b 1; Statutes A a 1; Taxation A e 1.

PARTIES (In action against railroad under Federal control see Railroads E a—in action of contract see Contracts F a—who may sue for annulment of marriage see Marriage C b—who may object to taking property for National Park see Constitutional Law I a 2—Motion for new parties in Supreme Court see Appeal and Error A b—Remand for, see Appeal and Error K a).

B Defendant.

a Joinder (Fraudulent joinder to prevent removal see Removal of Causes C b—Manager of private hospital not necessary party to revoke its license see Hospitals C c 1)

1. In an action against a municipal corporation and private corporations for causing a nuisance by reason of emptying sewage in a stream above the plaintiff's land, resulting in injury to plaintiff's land and affecting the health of the family at his residence: *Held*, the fact that each of the defendants acted independently of the others in emptying the sewage in the stream does not affect their joint liability when each knew or should have known that the

PARTIES—*Continued.*

sewage of each uniting with the other caused or would produce jointly the damages in suit, and a common concert of action, design, or purpose therein is not necessary to make them joint *tort-feasors* and their joinder as defendants is proper. *Semble*, there can be no contribution among joint *tort-feasors*. *Lineberger v. Gastonia*, 445.

2. Where the plaintiff alleges that he was riding in an automobile independently driven by another, and that he received injuries proximately caused by the concurrent negligence of such driver, and the driver of another automobile, alleging in detail sufficient matters to constitute negligence on the part of both drivers, the negligence alleged is of a joint tort, permitting recovery against each or both joint *tort-feasors*, and a demurrer to the complaint for misjoinder of parties and causes of action is bad. *Glazener v. Transit Lines*, 504.

3. Where a passenger of an autobus transportation company sues the bus company and a railroad company for injuries alleged to have been caused by a collision between the bus of one defendant and the train of the other, with the allegations of negligence as to each, he may recover against either or both defendants upon their joint or combined negligence, and a demurrer to the complaint is bad. *Vivian v. Transportation Co.*, 774.

PARTITION (Effect of partition on right to compensation for improvements see Improvements A a).

A Action for Partition.

a Proceedings and Relief

1. Whether, in an action for partition, a sale will best subserve the interests of the parties is a question of fact for the trial judge. *Lee v. Barefoot*, 107.

c Sale and Confirmation

1. While a tenant in common does not acquire title to lands in a proceeding for actual partition until confirmation of the partition by the court, the subsequent confirmation by the court relates back to the time of the partition, and the title vests in the tenant in common as of that time, and when the tenant in common dies between the time of the partition and the confirmation by the court, his administratrix by proper proceedings may sell the lands to make assets to pay his debts. *Parker v. Dickinson*, 242.

PARTNERSHIP.

A The Relation.

c Evidence of Partnership

1. The existence of a partnership must be shown *aliunde* the declarations of one of the members of the partnership, unless the declaration is made in the presence of the supposed partner who therein acquiesces, and the declaration of one that another was his partner, in the absence of the supposed partner and without his knowledge, is incompetent. *Wallace v. Estes*, 355.

PENDING ACTION see Pleadings D c 1.

PHYSICIANS AND SURGEONS.

C Rights, Duties, and Liabilities to Patient.

b Malpractice and Negligence (See, also, Hospitals B a 1; C a 1, 2)

1. The statute requiring a physician or midwife attendant upon childbirth to instill into the eyes of the newborn baby drops of a one per cent solution of silver nitrate does not impose upon the physician attempting in good faith to obey the statute the absolute duty of ascertaining the percentage of the solution furnished by a hospital for this purpose, and he is not liable for damages resulting from the use of a larger per cent of such solution when so furnished by the hospital. C. S., 7182. *Covington v. Wyatt*, 367.

2. Where a nurse furnished by a hospital takes a bottle of silver nitrate from the medicine chest of the hospital, the label on which is illegible as to the strength of the solution, and instills drops of this solution into the eyes of a newborn baby while attempting to comply with the statute requiring that a one per cent solution of silver nitrate be used for this purpose, the physician in charge is not liable in damages for the injury resulting from the fact that the solution used was stronger than the one prescribed by the State Board of Health, since the statute does not impose upon him the duty of analyzing the solution furnished by the hospital, and his neglect to analyze the solution is not negligence. *Ibid.*

PLEADINGS (In action of trespass see Trespass to Try Title A e.

A Complaint (Verification of complaint as proof of account see Account, Action on C a).

c Power of Trial Court to Allow Amendment

1. The judge of the Superior Court has within his sound discretion the statutory authority to permit the plaintiff to amend his complaint when thereby the ground of the alleged cause is not so substantially changed as to become a new or different cause of action, and *Held*, in this action to recover damages for a conspiracy to prevent the employment by others of a discharged employee, C. S., 4477, 4478, the cause of action alleged was not substantially changed by allowing an amendment to the effect that the plaintiff had been employed by the defendant prior to the time of the alleged conspiracy. C. S., 513. *Goins v. Sargent*, 478.

C Counterclaim.

a Persons Entitled to Plead Counterclaim

1. Where a corporation gives its note to its president to secure him against any loss he might sustain by reason of his endorsement of the corporation's notes, and the president transfers the note to a third person, who brings suit, the corporation may not set up as a counterclaim in the action indebtedness due the corporation by the president. C. S., 521. *Wellons v. Johnson*, 94.

b Subject Matter

1. Damages for an alleged assault by an officer in taking goods under claim and delivery or false arrest by him, cannot be maintained as a counterclaim in an action upon a note given by the defendant to the plaintiff for fertilizer sold to him, as it does not arise out of, and is

PLEADINGS—*Continued.*

not connected with the subject-matter of the action, and does not accrue until after the commencement of the main action. C. S., 519, 521. *Godwin v. Kennedy*, 244.

2. An unpaid judgment in favor of a party to an action rendered previously to the commencement of the present action is in legal effect a contract upon which a counterclaim may be pleaded in an action by the opposing party brought against him to recover on a promissory note. C. S., 521. *McClure v. Fulbright*, 450.

D Demurrer (Demurrer to jurisdiction see Courts A a 1—for misjoinder of parties see Parties B a; in action by stockholders see Banks and Banking H b 3).

a Cause of Action

1. A demurrer to a complaint on the ground that its allegations were insufficient to constitute a cause of action will not be sustained if, taking the pleading in its entirety it is sufficient in one or more of its parts; and where the demurrer is that the contract sued on was a wagering one and no recovery could be had under C. S., 2144, 2145, and two causes of action are alleged, if only one of them should be good the demurrer should be overruled. *Meyer v. Fenner*, 476.

2. Where the defendant demurs to the sufficiency of the allegations of the complaint, and sets up a counterclaim by way of answer to which the plaintiff demurs, and both demurrers are sustained: *Held*, the matters alleged both in the complaint and answer are admitted, and under the facts of this appeal the rights of the parties can be more satisfactorily determined after a full disclosure of all the facts and circumstances, and the action of the trial judge in sustaining the demurrers is reversed on appeal. *George v. Smathers*, 514.

3. Where the complaint contains allegations of criminal conspiracy, fraud, subornation of witnesses, suppression of evidence, and jury attaint, the cause of action stated is more than the procurement of a verdict by means of false testimony or the subornation of perjury, and the action should not be dismissed because the complaint failed to allege that the witness, upon whose testimony the verdict in question was rendered, has been convicted of perjury or that the falsity of the evidence has been established by writing or unimpeachable record, and a demurrer thereto on the ground that a cause of action is not stated is bad. *McCoy v. Justice*, 553.

4. Where a defendant has another party joined as a codefendant, and files an answer denying the allegations of negligence on his part and alleging that the negligence of such codefendant was the sole proximate cause of the injury in suit, but does not demand relief against such codefendant, and the complaint states no cause of action against him, the demurrer of the codefendant to the answer is good, and the action as to him will be dismissed. In this case the statute in regard to contribution between joint *tort-feasors* does not apply, the cause of action arising before its passage and operation. *Bargeon v. Transportation Co.*, 776.

PLEADINGS—*Continued.*

5. Where two defendants are sued for a joint tort, and one has filed an answer alleging the negligence of the other as the sole proximate cause of the injury in suit, but asks no relief against its codefendant, the demurrer of the latter to the answer of the former should be disregarded. *Vivian v. Transportation Co.*, 774.

c Speaking Demurrer

1. Where there is no allegation in the complaint of the pendency of a prior action, this defense may not be taken upon demurrer. *Lineberger v. Gastonia*, 445.

d When Demurrer May be Pleaded

1. Objections to the sufficiency of the complaint to state a cause of action may be taken at any time in the orderly progress of the trial, or in the Supreme Court, or the Court may *ex mero motu* take notice of the insufficiency. *Lassiter v. Adams*, 711.

G Issues, Proof, and Variance.

a Variance Between Allegations and Proof (In criminal cases see Indictment E)

1. A complaint proceeding upon one theory will not authorize a recovery upon another and entirely distinct and independent theory, and where the allegations of the complaint state one cause of action and the evidence is to matters not alleged, and on another cause of action, a judgment as of nonsuit is properly granted. *Smith v. Cook*, 558.

POWER COMPANIES see Electricity.

PRESUMPTIONS—of guilt from possession of stolen goods see Burglary A a 1; of illegal possession of whiskey found on premises see Intoxicating Liquor B a 1; from use of deadly weapon see Homicide D a 1; of death after seven years absence see Death A a, Insurance M a; upon wife's delivery to husband of her separate property see Husband and Wife D b 1.

PRINCIPAL AND AGENT (Officers of bank as its agents see Banks and Banking C b—Insurance agents see Insurance K a—Wife as agent in driving family car see Husband and Wife B a).

C Rights and Liabilities as to Third Persons.

a Ratification

1. Where a depositor is permitted by the bank to draw on an anticipated deposit to be made from an expected loan from a third person, and the loan is made, the lender sending in care of the bank a check for the depositor, and upon receiving the check the bank endorses it for the depositor and places the amount to his credit, and thereafter the depositor draws on this deposit, with full knowledge of the facts: *Held*, the conduct of the depositor is a ratification of the endorsement by the bank, and he is estopped to deny this agency, and claim that the endorsement was without authority. *Sugg v. Credit Corp.*, 97.

PRINCIPAL AND SURETY (Guaranty see Guaranty).

B Nature and Extent of Liability of Surety (On claim and delivery bonds see Replevin G b).

b Surety Bonds for Public Improvements

1. A bank loaning money to a contractor to build a public highway for a certain township in a county may not recover against the surety on the contractor's bond on the ground that the money was used for the payment of laborers and materialmen furnishing labor and materials used upon the highway, without having thereupon procured assignments to it of their claims, nothing appearing in the note given the bank by the contractor showing that the loan was for this purpose. *Snelson v. Hill*, 494.

2. The compensation for the services of a foreman necessary to the construction of a county highway is recoverable by him against the surety on the contractor's bond where the bond is given in conformity with the statute. C. S., 2445. *Ibid.*

3. Where certain parts of a steam shovel used in connection with the construction of a county highway are replaced by other parts borrowed for the purpose, and are necessary in the construction, the surety on the contractor's bond is not liable under the statute for the payment of other like parts purchased to replace the borrowed parts which have thus been paid for. *Ibid.*

c Bonds of Public Officers and Agents

1. A bond indemnifying against loss arising from the defalcation of its collecting agents, naming a limit of its liability and providing for a renewal upon the payment of another premium, and providing that the liability shall not exceed that named in the policy originally issued, whether the loss shall occur during the term named or any continuances, by its express terms excludes a liability for losses occurring during the original and renewal periods beyond the amount stated in the policy originally issued. *Jacksonville v. Bryan*, 721.

2. Where an indemnity bond expressly excludes liability beyond a certain amount, it cannot be maintained that it was misleading to the insured in the absence of mutual mistake or fraud. *Ibid.*

PROCESS.

A Nature, Insurance, Requisites and Validity.

b Duty of Clerk to Issue

1. By chapter 66, Public Laws 1927, construed with C. S., 476, the clerk of the court from which a summons in a civil action has been issued is required to issue an alias or pluries summons if the process officer has not had time to serve the original within the time prescribed by statute, without the necessity of the plaintiff in the action applying therefor. *Neely v. Minus*, 345.

c Alias and Pluries Summonses; Chain of Summonses, and Discontinuance

1. Where in a civil action alias or pluries summonses are issued in the event of nonservice of the original, a break in the chain of summonses works a discontinuance, and where a summons is thereafter served it commences a new action. *Neely v. Minus*, 345.

PROXIMATE CAUSE see Negligence B.

PUBLIC OFFICERS (Officers of Municipal Corporations on Municipal Corporations D).

C Righs, Powers, Duties, and Liabilities.

c Malfeasance, and Nonfeasance

1. While corrupt intent is not necessary to sustain a conviction under the provisions of C. S., 4384, making it a misdemeanor for a public officer to wilfully or negligently omit, etc., to discharge any of the duties of his office, it is required that the indictment sufficiently charge the offense of which such officer is accused; and where the action is against the superintendent of a State hospital for the insane, and the indictment charges that he removed or caused to be removed patients to his private farm and caused them to be worked thereon, without allegation of injury to the public or to the patients, or of personal gain to the defendant, the indictment fails to charge facts sufficient to constitute an offense under the statute, and defendant's motion in arrest of judgment should be allowed. *S. v. Anderson*, 771.

PUBLIC IMPROVEMENTS see Municipal Corporations G.

RAILROADS (Control and regulation, power of Corporation Commission see Corporation Commission A b).

C Right of Way (Assessments against see Municipal Corporations G c 2—Acquisition of prescriptive rights against see Adverse Possession D a).

a Nature and Extent of Right of Way

1. Where a railroad company is given a deed to its right of way for all necessary railroad purposes, the question of necessity is primarily one for the railroad company. *Hodges v. R. R.*, 66.

b Injunctions and Restraining Orders in Respect Thereto

1. In an action to restrain a railroad company from building houses for the use of its foremen and section hands, employed in the necessary upkeep of railroad property, on a plot of ground deeded to it for all necessary railroad purposes, a temporary order restraining the company from building such houses until the final hearing should not be granted without a finding of fact that the company had not exercised its right in good faith, and was not using the land for necessary railroad purposes. *Hodges v. R. R.*, 66.

c Licensees and Trespassers

1. Where the railroad company knowingly and constantly permit the public to use a portion of its track as a walkway, a person walking thereon is a licensee and not a trespasser. *Jenkins v. R. R.*, 466.

D Operation (Liability for injuries to employees see Master and Servant—Liability as joint *tort-feasor* see Parties B a 3).

b Accidents at Crossings

1. In an action against a railroad company to recover damages for a personal injury alleged to have been negligently inflicted by a collision with defendant's train at a country grade crossing of a county highway with defendant's railroad track, evidence that the defendant did not maintain a watchman, gates, or signal gongs at the place is not evidence of its actionable negligence when there is

RAILROADS—*Continued.*

no evidence that such was necessary owing to unusual dangerous conditions existing at this particular place, such as obstructions to conceal the approach of trains, and where the evidence tends only to show that all the usual signs had been placed there, signals or warnings given, by the engineer, and the view was clear and unobstructed, and that the defendant was not otherwise negligent, a judgment as of nonsuit is properly entered. *Batchelor v. R. R.*, 84.

2. Where the question involved in an action for damages against a railroad company for the negligent killing of plaintiff's intestate by a collision at a highway crossing is whether the defendant's engineer should have stopped his train after the collision in time to have avoided the killing, evidence of a witness who had had experience as a fireman, that the train could have been stopped within the distance after applying the brakes, but that he did not have knowledge as to the time required to apply the brakes is but a conjecture, and no sufficient evidence to be submitted to the jury in the absence of legal evidence as to the time it would have taken to apply the brakes. *Ibid.*

3. Where in an action to recover damages for a personal injury alleged to have been negligently inflicted on the plaintiff by being struck by defendant's train while he was negligently attempting to cross the tracks without looking for the approach of trains, the doctrine of contributory negligence is applied in bar of the plaintiff's recovering damages. *Bailey v. R. R.*, 515.

4. Where there is evidence in an action against a railroad company tending to show that a freight train was blocking a street of a town in violation of an ordinance forbidding it to do so for more than ten minutes at a time, and that the plaintiff was a guest in a car driven by the owner thereof, and that the car collided with the obstructing train: *Held*, the violation of the ordinance is negligence *per se*, and the question of proximate cause should be submitted to the jury for its determination, and defendant's motion as of nonsuit should be denied. *Dickey v. R. R.*, 726.

5. The negligence of the owner driving an automobile at the time of its collision with a railroad train blocking the street of a town in violation of an ordinance is not ordinarily imputed to one riding in the automobile as a mere guest or invitee, but this principle is subject to modification under evidence tending to show that the owner and the guest were engaged in a joint enterprise. *Ibid.*

6. The plaintiff riding as the guest or mere invitee of the owner driving an automobile at the time of a collision with defendant's freight train standing across the street in violation of a town ordinance may not recover damages against the railroad company when the negligence of the driver of the automobile is the sole cause of the injury in suit. *Ibid.*

c Injuries to Persons On or Near Track

1. A railroad company is liable in damages for the injury of a licensee sitting on the end of a sill upon the track when by the exercise of due care by its employees in operating the train they saw or should have seen that he was in a helpless condition in time to stop the train and avoid the injury. *Jenkins v. R. R.*, 467.

RAILROADS—*Continued.*

2. Upon evidence tending to show that the plaintiff's intestate was sitting in a helpless condition upon the track of the defendant railroad company, and that by the exercise of due care the defendant's employees should have seen his condition in time to have avoided the injury by stopping the train, and there is also evidence of the contributory negligence of the intestate: *Held,* in addition to the issues of negligence, contributory negligence, and damages, an issue as to the "last clear chance" should have been submitted to the jury upon the conflicting evidence. *Ibid.*

3. A railroad company is required to keep a proper lookout ahead of its moving train for those upon the track at a place where they permit the track to be used by the public as a walkway, and it is not excused from this duty by the fact that at the time of running upon and killing a pedestrian obviously helpless upon the track, that those in charge of the operation of the train had other duties to perform in connection therewith preventing their keeping a lookout, this being available to the employees alone when they are joined as codefendants in the action. *Ibid.*

4. Evidence tending only to show that the plaintiff's intestate left the defendant's track at the approach of its train and returned to rescue his hog on the track when the running train was in about five feet of the place is insufficient to take the case to the jury upon the issue of negligence or apply the doctrine requiring a signal or warning to be given by the defendant's engineer, or that of last clear chance. *Redmond v. R. R.,* 768.

E Actions Against Railroad.

a Parties in Action Against Railroad Under Federal Control

1. The United States Director General of Railroads is a necessary and only party defendant in an action for negligence when the railroads were under government war control, and when the present incumbent has not been made a party, the action is properly dismissed. *Strickland v. Davis,* 161.

RATIFICATION—By principal see Principal and Agent C a; by infant of sale of property see Infants A c 1.

RECEIVERS.

B Appointment.

a Order of Appointment Binding According to its Terms When Unexcepted to

1. When, in an action to recover the purchase price of goods sold and delivered, the plaintiff alleges the purchase of an inventory of articles, giving a list of them, which the defendant denies, but alleges that only a part of the articles were purchased, not by him but by his son who had fully paid for them and, under order of court, a receiver was appointed to take possession of the goods, and the defendant retained possession under the further terms of the order, by filing a bond securing the payment of any judgment the plaintiff might recover in the action, whether the jury found the sale to have been made to the defendant or to his son, and the order provides that the son might be made a party: *Held,* the

RECEIVERS—*Continued.*

terms of the order, unexcepted to by defendant and under which he has proceeded, are binding upon him, and, in the action, issues as to purchase either by the defendant or his son should be submitted to the jury, and the court's refusal to submit such issues upon the application of the plaintiff entitles him to a new trial. *Hinnant v. Boyette*, 44.

E Allowance and Payment of Claims.

a Claims for Breach of Executory Contract of Employment

1. Upon the appointment of a receiver by a court of competent jurisdiction for any cause, executory contracts of employment of a corporation are thereby invalidated during the receivership, performance being made impossible by operation of law, and damages may not be recovered for its breach. *Wade v. Loan Association*, 171.

RECORDARI see Justices of the Peace E b.

RECORDS—Mutilation of, see Criminal Law G a 1—Record on appeal see Appeal and Error E.

REFERENCE.

C Report and Findings.

a Power of Trial Judge to Affirm, Modify, Set Aside, Rerefer, etc.

1. Where a compulsory reference is made, and the report filed containing findings of fact and conclusions of law, the trial judge has jurisdiction to re-refer the case to the same referee for further action as a matter within his discretion and not appealable, but he may not refer it to another referee with partial approval thereof for action upon the unapproved parts. C. S., 578. *Mills v. Realty Co.*, 223.

2. The trial judge has statutory authority to remove a referee for his failure to perform his duties as such, and to appoint another to perform them; as to whether he may set aside the report without cause and appoint another, *quere? Ibid.*

3. In passing upon the report of a referee under a consent reference the judge has the authority, in the exercise of his supervisory power under the statute, to affirm, amend, modify, set aside, make additional findings, or confirm or disaffirm the report in whole or in part. *Trust Co. v. Lentz*, 398.

4. Where the trial judge has ordered a compulsory reference upon the ground that the complaint stated a long and involved account, and where no exception is taken to the order by either party, the court is without authority to set aside the order of reference and submit the case to the jury when upon his rulings the referee has committed error in excluding certain evidence materially bearing upon the controversy. C. S., 577. *Trust Co. v. Jenkins*, 428.

b Exception to Report

1. A party to an action waives his right to a trial by jury by not excepting to the order of compulsory reference, and after such exception, by not tendering proper issues arising under his exceptions, or by not otherwise preserving his right thereto. *Trust Co. v. Jenkins*, 428.

REFORMATION OF INSTRUMENTS (Of insurance policy see Insurance E c).

A Grounds Therefor.

a In General

1. Reformation of an executed contract may be had only for mutual mistake, or for mistake on one side and fraud on the other. *Welch v. Ins. Co.*, 546.

b Mistake Induced by Fraud

1. Where there is evidence tending to show that the plaintiffs were business men of intelligence and that they had an opportunity to read a deed in which was an agreement to assume personal liability for a debt as a part of the purchase price of lands, but that they signed the instrument without reading it because they assumed that it was drawn in accordance with a previous agreement, with further evidence that the defendants said nothing and did nothing to prevent the plaintiffs from reading the deed, and that after discovery of the error the plaintiffs ratified the fraud by attempting to settle the debts so assumed by personal notes, etc.: *Held*, the plaintiffs are not entitled to recover, and a judgment as of nonsuit should have been allowed. *Cromwell v. Logan*, 588.

c Mutual Mistake.

1. In a suit to reform mortgage on lands upon the mutual mistake that a properly indexed junior mortgage should be subject to a prior insufficiently registered one under agreement between respective parties: *Held*, reformation of the instrument upon the verdict of the jury is not error. *Gray v. Mewborn*, 770.

REGISTRATION—of deeds see Deeds and Conveyances B; of mortgages see Mortgages C c; of chattel mortgages see Chattel Mortgages B; of conditional sales see Sales I a.

RELEASE—from liability for tort see Torts C.

REMAND see Appeal and Error K a, K b.

REMOVAL OF CAUSES.

C Citizenship of Parties.

b Separable Controversies and Fraudulent Joinder

1. Where the complaint in an action for damages alleges a joint *tort* of a nonresident defendant and resident defendants, upon a proper petition for the removal of the cause to the Federal Court and bond filed in the court of this State by the nonresident defendant, the State Court has jurisdiction to retain the cause upon the question of fraudulent joinder of the resident defendants to defeat the jurisdiction of the Federal Court. *Givens v. Mfg. Co.*, 377.

2. An action against a nonresident manufacturing company and its superintendent and foreman, brought by the employee who alleges, with particularity, acts of negligence against each defendant in failing to provide him a safe place in which to work, ordering him to continue to work under dangerous conditions known to them, and in not instructing him how to do the work required of him in a manner to avoid the danger: *Held*, the record discloses

REMOVAL OF CAUSES—*Continued.*

allegations of a joint *tort* against each of the defendants and the State Court will retain the cause upon the petition of the nonresident to remove it to the Federal Court. *Ibid.*

3. Where there is only one valid and subsisting cause of action stated in the complaint, a removal of the cause to the Federal Court upon petition of the nonresident defendant is not error when the amount is within the jurisdiction of the Federal courts. *Simmons v. Ins. Co.*, 667.

RENTS see Landlord and Tenant H a.

REPLEVIN; CLAIM AND DELIVERY.

D Pleading and Evidence.

a Burden of Proof

1. In claim and delivery proceedings the burden is on the plaintiff to establish a cause of action. C. S., 831. *Smith v. Cook*, 558.

G Liabilities on Bonds and Undertakings.

b Liability of Surety

1. Where a replevy bond is given in claim and delivery, and in the procedure in the Superior Court the defendant is required by the judge to give an additional bond, without reference to the first, after the defendant has disposed of the goods replevined by him, the surety on the replevy bond is not discharged by the giving of the second bond with another surety, both bonds being cumulative. *Long v. Meares*, 211.

2. The liability of the surety on a replevy bond in claim and delivery is not required to be determined in a separate action. *Credit Co. v. Teeter*, 232.

RESCISSION OF INSTRUMENTS see Cancellation and Rescission of Instruments.

RES GESTÆ see Evidence D a.

RES IPSA LOQUITUR see Electricity A c 1; Master and Servant C b 13; Food A a 1.

RES JUDICATUR see Judgments M.

RESTRAINING ORDERS see Injunctions.

RESTRICTIONS see Deeds and Conveyances C g.

RIGHT OF WAY see Railroads C.

ROADS see Highways.

RULES OF COURT see Appeal and Error F b; G a; Criminal Law L a.

RULE IN SHELLEY'S CASE see Wills E c.

SAFE PLACE TO WORK see Master and Servant C b.

SALES (Judicial Sales see Execution; Partition A c; Executors and Administrators F).

I Conditional Sales.

a Registration and Priority.

1. A title retaining contract in the sale of personalty is in the nature of a chattel mortgage, and when registered prior to an attachment of the property it is superior to the claim of the attaching creditor. *Weeks v. Adams*, 512.

2. Where the purchaser under a title retaining contract of sale of a chattel has falsely entered into the contract under an assumed name, and the contract is registered prior to a levy of attachment on the property: *Held*, the vendor's lien under the prior registered conditional sales contract is good as against the creditor's levy in attachment, as the title remains in the vendor unaffected by the subsequent attachment. *Ibid.*

SCHOOLS AND SCHOOL DISTRICTS (Liability of member of Board of Education for official acts see Municipal Corporations D e—Right to tax for schools see Taxation A a, A b—Power of city to maintain see Municipal Corporations B a—Annexation by city see Municipal Corporations A b 1, 2).

A Consolidation of School Districts.

a Power of County Board of Education

1. Where in the discretion of the county board of education in the exercise of good faith it is required for the best interest of a consolidated school district to sell certain property therein, and it appears that the district has been formed under the county-wide plan, equity will not grant injunctive relief. *Howard v. Board of Education*, 229.

SCOPE OF EMPLOYMENT see Master and Servant D b.

SERVICE see Process.

SERVICES RENDERED see Corporations G f; Executors and Administrators D a.

SET-OFF see Pleadings C.

SEWERAGE see Municipal Corporations E d.

SHELLEY'S CASE see Wills E c.

SPECIFIC PERFORMANCE.

B Contracts Enforceable Specifically.

a Contracts to Convey Realty

1. Where the husband and wife enter into a contract with another for the exchange of lands by mutual conveyance, and the privy examination of the wife is not taken to the contract to convey, the husband having only an inchoate right of curtesy in his wife's lands, the remedy of the other party to the contract is to tender his deed and receive a deed from the husband for his interest therein, and hold both the husband and wife for damages for any deficiency in the title if the wife will not then properly join in his deed. *Colwell v. O'Brien*, 508.

STATE (Officers of, see Public Officers).

E Claims Against State (Against Highway Commission see Highways A d).

a Consent to be Sued

1. The withdrawal by statute of the right of the Insurance Commissioner to use certain funds, derived by license tax, for the investigation of fires does not impair a vested right prohibited by the Constitution, and thereafter a suit by a citizen under a contract made for that purpose is a suit against the State without authority or consent of the State, and cannot be maintained in the Superior Court. Const., Art. IV, sec. 9. *O'Neal v. Wake County*, 184.

STATUTES (Proof of statutes of other states see Evidence I a).

A Enactment, Requisites, and Validity.

a Constitutional Requirements in Enactment

1. The act creating the North Carolina National Park Commission is a public act and does not fall within the purview of Article II, section 12, requiring notice that application to the General Assembly for the passage of a private act be made. *Yarborough v. Park Commission*, 284.

STATUTE OF FRAUDS see Frauds, Statute of.

STATUTE OF LIMITATIONS see Limitations of Actions.

SUBMISSION OF CONTROVERSY—Necessary facts agreed to appear of record see Appeal and Error K c 2; necessary parties see Appeal and Error K a 2.

SUICIDE—As evidence of guilt see Criminal Law G h.

SUMMONS see Process.

SUPERIOR COURTS see Courts A.

SUPREME COURT see Appeal and Error A.

SURETY see Principal and Surety.

SURGEONS see Physicians and Surgeons.

TAXATION (Assessments for public improvements see Municipal Corporations G).

A Constitutional Requirements and Restrictions.

a Right of Counties to Issue Bonds Without Approval of Voters Under County Finance Act

1. Under the provisions of the Municipal Finance Act, ch. 81, Public Laws of 1927, by proceedings duly had under proper resolution, a county may issue bonds for funding valid and binding obligations incurred prior to 1 July, 1927, for the necessary expenses of the county. *Mayo v. Comrs. of Beaufort*, 15.

2. Under the facts of this case, the validity of bonds issued for funding a valid indebtedness created prior to 7 March, 1927, for the operation of the constitutional six-months term of school, and bonds issued for funding a valid indebtedness created prior to 7 March, 1927, for erecting and equipping the county home for the indigent and infirm is upheld under the provisions of the County Finance Act. *Goodman v. Comrs. of Person*, 257.

TAXATION—*Continued.*

b Right of Cities to Tax for Maintenance of Schools

1. Where the charter of a city requires the board of aldermen to establish, maintain and support a system of public schools, and to appropriate annually for this purpose a certain part of the taxes of the city, and to fix the amount of the appropriation, and the charter does not provide for the submitting to the qualified voters the question of levying a tax for schools, the omission in the act to expressly provide for holding the necessary election will not invalidate bonds issued by the city for this purpose when the question has been submitted to and approved by the voters in an election held under general election laws, the power given to the city to maintain schools also giving the implied power to hold the necessary election. Const., Art. VII, sec. 7. *Hailey v. Winston-Salem*, 17.

c Uniform Rule and Ad Valorem

1. The North Carolina constitutional requirement that taxes for revenue only should be levied on property by a uniform rule according to its true value in money, Article V, section 3, is very broad in the legal significance of the language used, and includes both tangible and intangible property, and taxes on "trades, professions, franchises, and incomes." *Tea Co. v. Doughton*, 145.

d Power of Legislature to Classify Property for Taxation

1. While the subjects of taxation may be classified by the Legislature under the uniform rule prescribed by the Constitution, Article V, section 3, and under the "equal protection clause" of the Constitution of the United States, Fourteenth Amendment, section 1, the classification must not be arbitrary or unjust, but must be based on substantial and reasonable differences between such classes. *Tea Co. v. Doughton*, 145.

2. Chapter 80, section 162, Public Laws of 1927, which imposes a license tax of fifty dollars each on stores operated in this State when there are six or more such stores under the same management, but which imposes no such tax on other mercantile establishments doing the same business when there are less than six stores under one management, is an arbitrary classification, and unconstitutional. *Ibid.*

e Power to Lend Credit of State to Person, Association or Corporation

1. The statute establishing the North Carolina National Park Commission with the certain powers therein enumerated is for the benefit of the public of the State and not that of some third person, and does not fall within the provision of Article V, section 4, of the State Constitution requiring the approval of the voters at an election. *Yarborough v. Park Commission*, 284.

B Liability of Persons and Property.

c License Taxes

1. Under the provision of the Revenue Act, Public Laws of 1927, ch. 80, sec. 134(a), requiring a license for "manufacturing, producing, bottling or distributing" soft drinks, and requiring license for wholesaling by sec. 134(b), etc., providing that if the tax has been paid

TAXATION—*Continued.*

on any of these articles, machinery or equipment units under sec. 134(a), the tax levied on wholesaling shall not apply: *Held*, where the bottling of the beverage is done at a company's home office in this State and, at its expense of delivery and storage, sent to warehouses owned by it for distribution in other cities and towns herein, each of these distributing points is liable for the payment of the license tax, and does not come within the intent and meaning of the exempting provision. *Bottling Co. v. Doughton*, 791.

d Property Exempt from Taxation

1. A statutory exemption from taxation of bonds authorized by statute and issued by the State is a valid exercise of legislative authority. *Trust Co. v. Nash County*, 704.

2. The United States Government may issue its nontaxable bonds in pursuance of its governmental functions, and on the principle that agencies of the Federal Government are not subject to taxation by the State they are not subject to taxation, and it is not necessary that Congress in issuing such bonds secure this immunity by an express declaration to that effect, and this result is not in violation of the provision of the State Constitution requiring that all moneys, credits, investments in bonds be taxed by a uniform rule. *Ibid.*

3. The statute which makes it a misdemeanor punishable by fine or imprisonment for "any person to evade the payment of taxes by surrendering or exchanging certificates of deposit in any bank of this State or elsewhere for nontaxpaying securities" does not apply to the purchase before the tax listing date of nontaxable United States or State bonds by funds subject to taxation, and thereafter selling the bonds and redepositing the amount, when the transaction is made in good faith and the bonds are bought and sold on the open market and the title thereto passes absolutely in both transactions, and the purchaser of the bonds may not be taxed on the purchase price. *Trust Co. v. Nash County*, 704.

4. The purchasing of nontaxable government bonds before the date for the listing of property for taxation, and the later selling of the bonds, does not withdraw the money used in the original purchase from taxation, since the purchase price is subject to taxation. *Ibid.*

C Levy and Assessment.

d Mode of Assessment of Corporate Property, Stock, or Receipts

1. Where a corporation under the provisions of the Machinery Act, Public Laws of 1925, ch. 102, submits its report to the State Board of Assessment and the board in accordance with the statute certifies to the register of deeds of the county where the property is situated the corporate excess liable for local taxation, the exclusive remedy of the corporation if dissatisfied with the report of the board is to file exceptions with the board in accordance with the statute, with the right of appeal from the board upon a hearing by it, and the corporation may not pay the tax under protest and seek to recover it under the provisions of C. S., 7979. *Mfg. Co. v. Comrs. of Pender*, 744.

TAXATION—*Continued.*

2. The State Board of Assessment exercises a *quasi*-judicial function in settling an account on valuation of corporate property liable for local taxation, and the method provided by the statute for assessment and appeal from the assessment in the exercise of this function is constitutional and must be followed, and, *Held,* in the instant case the Board of Assessment reported results of the appraisement and did not report the individual items upon which the appraisement was made, and the appraisement of the value of the stock held in a foreign corporation was not so separated from the other property as to permit a variation of this rule. *Ibid.*

H Tax Deeds.

c Rights of Parties Upon Setting Aside Tax Deed

1. Where the plaintiff sustains his action to set aside defendant's tax deed under which defendant has been in possession of the lands, he must prove by his evidence the amount of rents the defendant has collected therefrom before he can recover them. *Hood v. Dunn,* 106.

I Forfeitures and Penalties.

a Failure to List Evidence of Indebtedness for Taxation

1. Public Laws of 1927, ch. 71, sec. 64, providing that notes, claims, etc., shall not be recoverable in any action or suit until they have been listed and the taxes paid thereon, will not be construed to work a forefeiture, and does not prevent a recovery on such evidence of debt, but postpones the recovery of judgment thereon until listed and the taxes paid, and where in an action on a note this defense is pleaded, the trial court has the power to allow the plaintiff to list it and pay taxes thereon during the trial and give judgment. *Wooten v. Bell,* 654.

TELEGRAPH COMPANIES.

A Liability for Negligence in Transmitting and Delivering Telegrams.

a "Death Message"

1. A telegram received for transmission by a telegraph company reading, "Come at once, Lawrence is seriously shot and cannot live," is a death message, and in itself gives notice to the company that from its negligent failure to deliver it damages would likely be caused the sendee. *Gibbs v. Telegraph Co.,* 516.

2. Where a telegraph company receives a telegram for transmission and delivery, relating to sickness and death, so worded as to apprise it that damages would likely result to the addressee upon its negligent failure to deliver it, it is unnecessary for the company to have been notified of the relationship of the addressee as mother of the person named in the message in order for her to recover damages for her mental anguish proximately caused by the company's negligent delay, and she is not required to prove that such mental anguish was in fact suffered by her, as this will be presumed from the relationship of mother and son. *Ibid.*

d Measure of Damages

1. In an action by the mother, the addressee of a telegram informing her of the fatal shooting of her son and telling her to come, where there is evidence tending to show that she received the information

TELEGRAPH COMPANIES—*Continued.*

first through the item of a newspaper too late to reach his bedside before his death, the jury may award such damages as they may find she had actually suffered as the proximate cause of the defendant's negligence in the delay of the delivery of the message sued on. *Gibbs v. Telegraph Co.*, 517.

2. Where a telegram to a mother informing her of the fatal shooting of her son is delayed on its delivery, and there is evidence that she first received the information from another source in time to have reached his bedside before his death, and also evidence to the contrary: *Held*, under the doctrine requiring her to do what she reasonably could to minimize her damages, the question of whether she made every reasonable effort to reach the bedside of her son before his death is for the jury. *Ibid.*

TENANTS—in common, right to partition, see Partition—for life see Life Estates—Landlord and Tenant see Landlord and Tenant.

TOOLS AND APPLIANCES see Master and Servant C b.

TORTS (See Negligence; Master and Servant; Railroads D; Highways B; Municipal Corporations E; Hospitals; and particular titles of Torts).

B Liability of Joint Tort-Feasors (Joinder see Parties B a).

b Right of Tort-Feasor to Contribution or Indemnity from Other Tort-Feasors

1. Where one joint *tort-feasor* is only passively negligent, while the other is guilty of positive acts and actual negligence, directly causing the injury in suit, both are liable to the injured party, but the former is entitled to recover indemnity against the latter. *Johnson v. Asheville*, 550.

2. Where a municipal corporation makes a contract for municipal construction, and the party contracting to do the work makes an agreement with a third party to do the work, and in the course of construction the plaintiff's property is negligently damaged by blasting: *Held*, all three parties are joint *tort-feasors* and liable to the injured person, but the municipal corporation is entitled to have the issue, tendered by it, of primary and secondary liability as between it and the original contractor considered and determined according to law. *Ibid.*

C Release from Liability Therefor.

a Joint Tort-Feasors

1. A release of one joint *tort-feasor* from damages caused by wrongful death ordinarily releases both of them from liability for the joint tort. *Massey v. Public Service Co.*, 299.

2. Where a release from damages for a wrongful death is procured by one joint *tort-feasor* from the administrator of the deceased, who is fully informed of its effect and was not under any disadvantage, it will inure to the benefit of the other *tort-feasor*, and in the absence of fraud, the release is valid and binding on the administrator as to both *tort-feasors*. *Ibid.*

TORTS—*Continued.*

b Fraud in the Procurement of Release

1. Representations of the defendant that the plaintiff could not recover in an action for damages for wrongful death is one of legal inference, and ordinarily is not evidence of fraud sufficient to set aside a release from liability for a negligent act. *Massey v. Public Service Co.*, 299.

TRADE UNIONS see Master and Servant A d 1, 2.

TRESPASS, FORCIBLE see Forcible Trespass.

TRESPASS TO TRY TITLE.

A Actions.

e Pleadings

1. A description of land as being a five thousand-acre tract along the line of a certain railroad track, and within a 59,025-acre tract granted by the State to a certain person, is too vague and indefinite to admit of evidence to fit the *locus in quo* to the description, and is an insufficient allegation in the complaint in an action involving its title, and a demurrer to the complaint is properly sustained. *Timber Co. v. Eubank*, 724.

TRIAL (by Jury see Reference C b 1—New trial by order of trial court see New Trial—In criminal cases see Criminal Law I).

B Reception of Evidence.

c Objections and Exceptions

1. Error of the trial court in admitting evidence may be cured by the later admission of the same evidence without objection. *Street v. Coal Co.*, 178.

2. Where objection to the admission of evidence is withdrawn during the trial, error, if any in its admission, is cured thereby. *Godwin v. Kennedy*, 244.

3. Where evidence has been admitted at the trial and afterwards excluded on motion in the voluntary absence of appellant's counsel, an exception thereto made for the first time on the settlement of the case on appeal, is not taken in apt time and will not be considered on appeal. *Ins. Co. v. Boddie*, 666.

d Motion to Strike Out

1. It is not error for the court upon the trial to strike out direct evidence and exclude evidence in corroboration of such direct evidence when such evidence is insufficient to sustain the allegations of the answer of the objecting defendant. *Dunlop v. Smith*, 502.

2. Where exception is taken to a question asked a witness and the answer of the witness is not responsive, a motion to strike out the answer should be made, and where this is not done the exception will not be considered on appeal. *S. v. Gooding*, 710.

D Taking Case or Question from Jury.

a Nonsuit (Sufficiency of evidence see Master and Servant C, and particular titles of actions and persons liable, and Criminal Law G m).

1. Defendant's motion as of nonsuit upon the evidence will be denied if there is any sufficient evidence, testified to by either the plaintiff's

TRIAL—*Continued.*

or defendant's witnesses, circumstantial or otherwise, viewed in the light most favorable to the plaintiff, to take the issue to the jury for determination. C. S., 567. *Goss v. Williams*, 213; *Cromwell v. Logan*, 588.

2. Upon defendant's motion as of nonsuit the evidence is to be taken in the light most favorable to the plaintiff, and he is entitled to every reasonable intendment therefrom, and every reasonable inference in his favor. C. S., 567. *Ellis v. Herald Co.*, 262.

3. Where there is any legal evidence sufficient to support the plaintiff's action, defendant's motion as of nonsuit thereon will be dismissed: and *Held*, in this case the evidence was sufficient to be submitted to the jury. *Burnett v. Williams*, 620.

4. Where the plaintiff's evidence is conflicting in some respects its credibility is for the jury; and *Held*, under the facts of this case, the evidence viewed in the light most favorable to the plaintiff was sufficient on the question of defendant's actionable negligence to be submitted to the jury. *Stevens v. Rostan*, 315.

5. A defendant to an action waives his right to object to the sufficiency of the evidence by not making a motion as of nonsuit at the close of the plaintiff's evidence and renewing the motion at the close of all the evidence in the case. *Murphy v. Power Co.*, 484; *Gibbs v. Telegraph Co.*, 516; *Grant v. Power Co.*, 617.

E Instructions.

a Province of Court and Jury in General

1. It is the duty of the court to state in a plain and correct manner the evidence given in the case and to explain the law arising thereon and it is the province of the jury to ascertain the facts from the evidence, the weight and credibility thereof being exclusively for its determination. C. S., 564. *In re Will of Bergeron*, 649.

b Expression of Opinion by the Court

1. Where the charge of the court below on the issue of testamentary capacity, read from the text-book, is that where the testator's sickness is wholly physical, proof of his condition as to lethargy, unconsciousness, etc., "is entitled to a little consideration," and that the courts will "scrutinize efforts of witnesses to infer mental weakness or insanity from mere physical decrepitude," and that "the will of an aged person should be regarded with great tenderness" when not procured by fraud, etc., is held as reversible error as an expression by the court on the weight and credibility of the evidence, C. S., 564, and a new trial will be awarded on appeal. *In re Will of Bergeron*, 649.

e Requests for Instructions

1. Where the instructions of the court to the jury are sufficiently comprehensive of the law arising upon the evidence, it is required that a party objecting thereto for indefiniteness must tender special instructions as to the particulars he desires more specific instructions upon. *O'Brien v. Parks Cramer Co.*, 359; *Winchester v. Byers*, 383; *Murphy v. Power Co.*, 485; *Tate v. Parker*, 499.

TRIAL—*Continued.*

2. An erroneous instruction on the issue of the measure of damages entitled the party prejudiced thereby to a new trial without the necessity of his having submitted a prayer for instructions thereon. *McCall v. Lumber Co.*, 598.

3. A request for instructions correctly embodying the law of the case arising from the evidence and material to the case must be substantially given by the court, and its refusal will constitute reversible error. *S. v. Lee*, 714.

4. If a party desires that an unresponsive answer not be considered by the jury he should request an instruction to that effect. *S. v. Gooding*, 710.

f Objections and Exceptions

1. Where the judge, in his charge to the jury, misstates the admissions of a party, the mistake should be called to his attention at some appropriate time before the issues are finally given to the jury, or in time for him to correct the error, if any made by him. *Randolph v. Lewis*, 51; *Hardison v. Jones*, 712.

2. Exceptions must be taken at the time to the statement of the contentions of the parties by the trial judge in his instructions to the jury to be considered by the Supreme Court on appeal. *White v. Mitchell*, 89.

3. An inadvertent error in the recitation of a fact in evidence by the court in his charge to the jury should be called to his attention at the time by the excepting party. *S. v. Ashe*, 387.

g Construction and General Rules Upon Review of Instructions

1. The charge of the court to the jury, if correct when construed as a whole, will not be held for error. *S. v. Lambert*, 524.

2. Under the rule that a charge of the court to the jury will be construed contextually as a whole, unconnected excerpts from the charge appearing of record as exceptions is not sufficient. *Clark v. Laurel Park Estates*, 624.

F Issues (Of last clear chance see Railroads D c 2—of assumption of risks see Master and Servant C f 1).

a Form and Sufficiency in General

1. Exceptions to the issues submitted by the judge to the jury in an action of ejectment are untenable when it appears on appeal that the issues submitted fully embrace all issuable matters raised by the pleadings and supported by the evidence, and fully embrace all the contentions of the parties. *Power Co. v. Taylor*, 55; *Refining Co. v. Mills Co.*, 327.

2. In an action to recover damages caused by flooding public roads upon which plaintiff was dependent for access to his land, where there is no contention that such road was private, the question of plaintiff's right to use such road by adverse use is not presented. *Grant v. Power Co.*, 617.

TRIAL—*Continued.*

G Verdict.

a Setting Aside Verdict (As against weight of evidence is within discretion see Appeal and Error J b 4; for excessive damages see Appeal and Error J b 3)

1. A verdict may be set aside out of term and out of the county under an agreement of counsel authorizing the judge to do so. *Ward v. Agrillo*, 95.

H Trial by Court by Agreement.

b Findings of Fact

1. Where the parties to an action agree that the judge pass upon the evidence and find the facts involved, his findings have the same force and effect as the verdict of the jury would have had upon issues submitted. *In the Matter of Assessment Against R. R.*, 756.

TRUSTS—Power of trustee to sell interests in land for payment of bequests see Wills E b 1.

ULTRA VIRES ACTS—of National Banks see Banks and Banking D a.

USURY.

A Usurious Contracts and Transactions.

a Construction of Contracts or Transactions as Usurious

1. In construing a transaction with regard to our usury statutes the courts will look to its substance and not to its form. C. S., 2306. *Pratt v. Mortgage Co.*, 294.

2. Where there is evidence that the maker gave his note to the payee who, in accordance with a previous agreement, endorsed it to the defendant, who paid to the maker a less sum than the face value of the note, and that the maker, upon maturity of the note, paid to the endorsee defendant the full face value of the note, together with interest thereon at the rate of six per cent, and that the maker received nothing from the payee in exchange for the note, but that the payee was used for the purpose of circumventing the provisions of our usury statute, C. S., 2306: *Held*, the evidence is sufficient to establish a usurious transaction, and a motion as of nonsuit thereon is properly denied. *Ibid.*

3. A loan secured by a broker is not tainted with usury as between the broker and the proposed borrower by reason of the fact alone that the broker procured the loan from a bank upon consideration that the bank receive a part of the commissions when the bank charged the borrower only the lawful rate of interest. *Patterson v. Blomberg*, 433.

VARIANCE see Pleadings G a.

VENDOR AND PURCHASER see Chattel Mortgages.

VENUE (Jurisdiction of State and Federal Courts see Removal of Causes).

A Nature or Subject of Action.

1. An action for wrongful conversion of severed timber is not removable as a matter of right to the county in which the land from which the trees were severed is situated. *Lumber Co. v. Stave Co.*, 38.

VENUE—*Continued.*

C Change of Venue.

a For Convenience of Witnesses, etc.

1. The transfer of a cause from the court of one county to another in the discretion of the trial judge for the convenience of witnesses and to promote justice, C. S., 470, is not reviewable on appeal to the Supreme Court. *Power Co. v. Klutz*, 358.

WAR RISK INSURANCE see Insurance N a 1.

WATER COMPANIES see Municipal Corporations F.

WATERS AND WATERCOURSES.

C Surface Waters, Dams, and Ponds (Liability of city in regard thereto see Municipal Corporations E d 1, 2).

a Mutual Rights and Duties in Respect Thereto

1. While the upper proprietor of lands may not divert the surface water thereon from its natural flow to the damage of the lands of the lower proprietor, the latter may not dam the water back upon the lands of the former to his damage. *Winchester v. Byers*, 383.

b Damages for Diverting or Damming Surface Waters

1. An upper proprietor of lands may recover damages against the lower proprietor for unlawfully damming the surface flow of water back upon his lands to the time he sells and conveys his land to another, and instructions so confining the damages is proper. *Winchester v. Byers*, 383.
2. Where temporary damages caused by a wrongful diversion of the flow of surface water are sought in an action, an exception to a charge generally correct as to the law arising from the evidence as to the amount of damages recoverable will not be sustained when the appellant has failed to tender prayers for instructions going into more specific detail. *Ibid.*
3. Where damages are claimed against the city for ponding water back upon lands abutting a stream, and the case is tried upon the theory that a smaller or meter dam, erected subsequently to a larger dam, was the cause of the injury in suit, and by consent this meter dam is ordered to be removed by the court: *Held*, a new trial will be ordered on appeal when it does not appear with sufficient certainty whether the jury, under the evidence and instructions, have excluded the award of permanent damages from the verdict. *Ibid.*
4. Continuing damages caused to the lands of an upper proprietor by the ponding of water by the lower proprietor back upon them may be recovered by the former in his action brought every three years for damages occurring within that period assessed to the time of the trial, or at his option he may sue for the entire damages when they are of a permanent nature, but when it is made to appear that the nuisance causing the damage has been entirely abated, pending the action, the measure of damages will only be laid up to the time of the abatement. *Wharton v. Mfg. Co.*, 719.

WILLS.

C Requisite and Validity.

d Holographic Wills

1. A paper-writing written in full in the testator's handwriting and signed by him, showing *animus testandi*, and found after his death among his valuable papers is valid as his holograph will. *In re Will of Groce*, 373.

2. The requirements of C. S., 4131, that a paper-writing sufficient to pass as a holograph will must be found after the death of the testator among his valuable papers and effects must be liberally construed, and where it is found among the deceased's papers and effects evidently regarded by him as his most valuable papers, and are in fact valuable, under circumstances showing his intention that that will should take effect as being so found, it is sufficient, and under the facts of this case the paper-writing was adjudged to be effective as his will when found after his death in the pockets of the clothes he was wearing, with large sums of money and other papers of value. *Ibid.*

3. Where the only evidence as to the handwriting of the testator is the testimony of two witnesses that the paper-writing is in the handwriting of the testator, and upon cross-examination their testimony thereon is uncontradicted, but their credibility is attacked, their evidence is sufficient to take the case to the jury, their credibility being for its determination. *Ibid.*

f Requisites and Validity of Codicils

1. A note payable to the deceased, found with his holographic will in a box with his other valuable papers after his death, and endorsed thereon in the handwriting of the deceased and over his signature to his wife to take effect after his death, when proved as the statute requires, is to be construed as a codicil to his will, and it is not necessary to such construction that it be physically attached to the holographic will. C. S., 4144. *In re Will of Thompson*, 271.

D Probate, Establishment, and Annulment.

a Probate and Caveat in General

1. Where a will has been duly probated in common form it is conclusively presumed to be the will of the testator until set aside by a proceeding properly brought for the purpose, C. S., 4145, and is not subject to collateral attack. *In re Will of Cooper*, 418.

b Actions to Establish or Determine Validity in General (Expression of opinion by court in proceedings see Trial E b 1)

1. After a will has been duly probated in common form, to which no caveat has been entered, and a later paper-writing purporting also to be the will of the same deceased person is allowed to be produced and duly probated, the verdict of the jury upon a caveat filed thereto, under sufficient evidence and correct instructions that the later will was not signed by the testator, operates, in effect, to leave the will first probated the valid will of the testator therein, and the other issues in the caveat proceeding, which the jury did not

WILLS—*Continued.*

answer, as to mental capacity and undue influence, and the question as to whether the first will could have thus been set aside, are immaterial. *In re Will of Cooper*, 418.

2. Where a will has been duly admitted to probate as the last will and testament of the deceased, another and later will apparently independently written and making an entirely different disposition of the property cannot be construed and be given effect as a codicil to the former will. *Ibid.*

h Evidence in Caveat Proceedings

1. Evidence in a caveat proceeding that the testator was not capable of making a will and that under the circumstances he could not have signed it, is sufficient under the facts of this case to sustain a verdict that the will was a forgery. *In re Will of Cooper*, 418.

E Construction.

a General Rules of Construction

1. In the absence of some controlling rule of law or public policy, a will and codicils thereto will be construed to give effect to the intent of the testator to be gathered from several related instruments considered as an entire whole. *Ellington v. Trust Co.*, 755.

b Estates and Interests Created

1. Where B. takes an estate with use and occupancy for life in trust with discretionary power given trustees named in the will to sell trees growing upon the lands, mineral rights, etc., during the life tenancy, and from the proceeds to pay a sum named to a designated hospital, during the continuance of the life estate it is subject to the sale by the trustees of the interests specified, and where the remainderman has acquired this preceding estate the title does not merge so as to vest in him the full fee-simple title. *Shull v. Rigby*, 4.

2. Upon a devise of real and personal property to the wife during widowhood, the moneys of the testator in the bank go to her subject to the restrictions contained in the will, and while she may not dispose of them by will, she is entitled to whatever moneys she may have saved, arising from the *corpus* of the estate, and may so dispose of them. *White v. Mitchell*, 89.

3. Where the widow under the terms of the will of her husband may only dispose of the moneys in the bank to her credit, and not such as may at her death have passed to the remainderman under his will, it may be shown by disinterested witnesses as to what part passed under the widow's will, as not objectionable evidence under C. S., 1795, based upon conversations with other living parties interested under the husband's will. *Ibid.*

4. A devise by the wife to her husband of all her property, real, personal and mixed, during his life to do with and use as he might desire, and after his death to M. in fee, "all that is left": *Held*, the husband received by the devise only a life estate in the lands and M. takes an estate in fee simple in remainder. *Cagle v. Hampton*, 470.

WILLS—*Continued.*

c Application of Rule in Shelley's Case and Estates Created Thereunder

1. A devise of an estate to the testator's wife 'for life then. to his daughter "and to her heirs lives of her body, if no living heirs of her body at her death" with limitation over: *Held,* the words "no living heirs of her body at her death" are construed as *discriptio personarum* of those who are to take according to the intent of the testator and there being no children of the daughter, the limitation over takes effect as the stock of a new descent, by purchase, and the rule in *Shelley's case* has no application. *Barnes v. Best,* 668.

2. A devise of a life estate to the wife of the testator and then to his daughter "and to her heirs lives of her body, if no living heirs of her body at her death, to B.": *Held,* assuming that the daughter was to take a base or qualified fee under the will, upon her death without children B. took a fee-simple estate in the lands unaffected by the rule in *Shelley's case. Ibid.*

d Vested or Contingent Estates and Interests

1. A devise and bequest of testator's real and personal property to his wife for life, with direction that at her death the entire estate be converted into cash and the proceeds go in remainder to his and her brothers and sisters if living, and if not, to their legal representatives: *Held,* the contingency upon which the funds in remainder vests is the death of the life tenant, the brothers and sisters of the testator and his wife living at the termination of the life estate taking per capita and the legal representatives of those who had previously died taking *per stirpes. Trust Co. v. Stevenson,* 29.

e Afterborn Children

1. A child born after the testator has executed his will, and who is not therein mentioned or provided for, is entitled to such share and proportion of her father's estate as if he had died intestate. C. S., 4169. *Trust Co. v. Lentz,* 398.

i Actions to Construe Wills

1. The executor of a will may apply to the court for an interpretation thereof. *Trust Co. v. Lentz,* 398.

2. Where an executor has applied to the court to obtain a construction of a will with respect to the value of the parts to be taken by each of the beneficiaries, the judgment of the court, unappealed from, is to be considered by the court in a subsequent proceeding by the executor to obtain information for his guidance. *Ibid.*

F Rights and Liabilities of Devisees and Legatees (Whether devisees take by purchase or descent see Descent and Distribution A a—Right of testator to charge specific bequests with payment of designated debts see Executors and Administrators D e 1, 2, 3).

a General Devises and Bequests

1. A legatee, ordinarily, is not entitled to compensation for loss he may have sustained by reason of the diminution of the value of his legacy or for his failure or inability to collect the purchase price thereof. *Ricks v. Trust Co.,* 36.

WILLS—*Continued.*

d Election

1. Where a devise of land is clearly stated in the will as unconditional, it may not be otherwise shown by parol that the devise was in lieu of other lands owned by the devisee, and thus put him to his election, or stop him from claiming under the will by his being present at the time the will was probated, and not making objection. *Peel v. Corey*, 79.

WITNESSES see Evidence.

WRONGFUL DEATH see Death B.